

(23,925)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 290.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF
IN ERROR,

vs.

CLARK BROTHERS COAL MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

INDEX.

	Original.	Print
Writ of error to the supreme court of Pennsylvania.....	1	1
Copy of bond on writ of error.....	3	2
Citation and service.....	5	3
Petition for writ of error.....	6	4
Specifications of error to the Supreme Court of the United States	9	6
Order enlarging time in which to prepare transcript.....	13	9
Record from court of common pleas.....	14	10
Plaintiff's statement.....	14	10
Rule on defendant to plead.....	26	17
Petition to dismiss action for want of jurisdiction.....	27	18
Order overruling motion to dismiss action, &c.....	29	19
Motion to amend statement of claim.....	30	20
Motion to continue and plea of surprise.....	31	20
Order granting motion to amend.....	32	21
Order of court overruling defendant's plea of surprise.....	33	21
Plaintiff's amended statement.....	34	22
Demurrer to plaintiff's amended statement of claim.....	46	29

	Original.	Print
Motion to strike off demurrer.....	49	30
Defendant's pleas.....	50	31
Excerpts from the testimony of J. O. Clark.....	52	32
Plaintiff's Exhibit No. 26½—Letter from J. O. Clark to M. Trump, March 5, 1907.....	63	39
Plaintiff's Exhibit No. 27—Letter from M. Trump to J. O. Clark, March 6, 1907.....	65	41
Defendant's Exhibit No. 2—Statement.....	82	51
Excerpts from the testimony of Joseph H. Dorn.....	88	54
Excerpts from the testimony of E. C. Howe.....	95	58
Defendant's Exhibit "A"—Letter from J. H. Dorn to Clark Bros. Coal Mining Co., June 9, 1908.....	101	62
Testimony of M. Trump.....	103	63
Testimony of M. Trump (recalled).....	107	65
Excerpts from testimony of George W. Creighton.....	121	73
Defendant's Exhibit No. "3"—Certified copy of com- plaint in case of Clark Bros. Coal Mining Co. vs. Penna. R. R. Co. before the Interstate Commerce Commission	124	75
Excerpts from Defendant's Exhibit No. 4—Supplemental report of Interstate Commerce Commission.....	138	84
Defendant's Exhibit No. 5—Report of Interstate Commerce Commission	148	90
Excerpts from Defendant's Exhibit No. 7—Certified copy of report and order of the Interstate Commerce Commission in case of Hillsdale Coal & Coke Co. vs. Penna. R. R. Co.	157	96
Defendant's Exhibit No. 8—Certified copy of report and order of the Interstate Commerce Commission in the case of R. R. Commission of Ohio vs. Hocking Valley Railway Co.	171	104
Excerpt from Defendant's Exhibit No. 9—Order of Inter- state Commerce Commission in case of Traer, receiver, etc., vs. Railway Companies.....	195	119
Excerpt from Defendant's Exhibit No. 10—Order of Inter- state Commerce Commission in case of Rail & River Coal Co. vs. Baltimore & Ohio R. R. Co.....	197	121
Defendant's Points Nos. 3, 4, 5, 6, 7, 9, and 11.....	199	122
Verdict of the jury and judgment thereon.....	204	125
Motion in arrest of judgment and for a new trial.....	205	125
Motion for judgment <i>non obstante veredicto</i>	206	126
Opinion sur motions in arrest of judgment and for new trial, and for judgment <i>non obstante veredicto</i>	207	126
Decree sur motions.....	224	136
Assignments of error to the supreme court of Pennsylvania, Nos. 1, 12, 13, 14, 15, 16, 18, and 19.....	225	136
Opinion, Mestrezat, J.....	229	139
Præcipe pro record.....	234	142
Prothonotary's certificate.....	240	147
Certificate of prothonotary and chief justice.....	241	147
Additional record ordered to stand as return to writ of cer- tiorari	1a	148
Petition for enlargement of time for preparing record.....	1a	148

INDEX.

iii

	Original.	Print
Order granting enlargement of time for preparing record..	3a	149
Copy of præcipe indicating additional portions of record...	5a	149
Excerpt from testimony of J. O. Clark.....	1	152
Jacob H. Miller.....	13	160
W. R. Cameron.....	44	179
E. B. Chase.....	48	181
J. A. Jardene.....	60	189
A. C. Bowser.....	61	189
Jos. H. Dorn.....	66	192
C. W. Proctor.....	70	194
Testimony of P. E. Womelsdorf.....	72	195
Excerpt from testimony of E. C. Howe.....	75	196
John B. Salsgiver.....	78	198
E. B. Koozer.....	80	199
Thomas Bryson.....	82	200
A. M. Riddle.....	102	211
Testimony of W. J. Trevesick.....	114	218
J. O. Clark (recalled).....	116	220
J. R. Ratew.....	118	221
Plaintiff's Exhibit No. 29—Statement	136	231
No. 31—Statement	145	237
No. 32—Statement	146	238
No. 33—Statement	147	238
Testimony of Jacob H. Miller.....	148	239
Plaintiff's Exhibit No. 38—Statement	149	240
No. 39—Statement	150	241
No. 40—Statement	151	242
No. 41—Statement	152	242
Excerpt from Defendant's Exhibit No. 7.....	153	243
Excerpt from testimony of M. Trump.....	154	243
G. W. Creighton.....	157	244
M. Trump (recalled).....	162	247
G. E. Oler (recalled).....	163	247
Defendant's Exhibits Nos. 26 and 27—Statement	191	264
Defendant's Exhibit No. 33—Statement.....	192	266
Excerpt from Defendant's Exhibit No. 7.....	193	267
Excerpt from testimony of P. E. Womelsdorf.....	194	267
Plaintiff's motion to strike off demurrer.....	200	270
Motion to amend statement as to amount claimed.....	201	270
Charge of the court.....	202	271
Plaintiff's points.....	226	285
History of the case.....	231	288
Prothonotary's certificate.....	234	290

The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the
the twenty-first is the fact that the
the twenty-second is the fact that the
the twenty-third is the fact that the
the twenty-fourth is the fact that the
the twenty-fifth is the fact that the
the twenty-sixth is the fact that the
the twenty-seventh is the fact that the
the twenty-eighth is the fact that the
the twenty-ninth is the fact that the
the thirtieth is the fact that the
the thirty-first is the fact that the
the thirty-second is the fact that the
the thirty-third is the fact that the
the thirty-fourth is the fact that the
the thirty-fifth is the fact that the
the thirty-sixth is the fact that the
the thirty-seventh is the fact that the
the thirty-eighth is the fact that the
the thirty-ninth is the fact that the
the fortieth is the fact that the
the forty-first is the fact that the
the forty-second is the fact that the
the forty-third is the fact that the
the forty-fourth is the fact that the
the forty-fifth is the fact that the
the forty-sixth is the fact that the
the forty-seventh is the fact that the
the forty-eighth is the fact that the
the forty-ninth is the fact that the
the fiftieth is the fact that the
the fifty-first is the fact that the
the fifty-second is the fact that the
the fifty-third is the fact that the
the fifty-fourth is the fact that the
the fifty-fifth is the fact that the
the fifty-sixth is the fact that the
the fifty-seventh is the fact that the
the fifty-eighth is the fact that the
the fifty-ninth is the fact that the
the sixtieth is the fact that the
the sixty-first is the fact that the
the sixty-second is the fact that the
the sixty-third is the fact that the
the sixty-fourth is the fact that the
the sixty-fifth is the fact that the
the sixty-sixth is the fact that the
the sixty-seventh is the fact that the
the sixty-eighth is the fact that the
the sixty-ninth is the fact that the
the seventieth is the fact that the
the seventy-first is the fact that the
the seventy-second is the fact that the
the seventy-third is the fact that the
the seventy-fourth is the fact that the
the seventy-fifth is the fact that the
the seventy-sixth is the fact that the
the seventy-seventh is the fact that the
the seventy-eighth is the fact that the
the seventy-ninth is the fact that the
the eightieth is the fact that the
the eighty-first is the fact that the
the eighty-second is the fact that the
the eighty-third is the fact that the
the eighty-fourth is the fact that the
the eighty-fifth is the fact that the
the eighty-sixth is the fact that the
the eighty-seventh is the fact that the
the eighty-eighth is the fact that the
the eighty-ninth is the fact that the
the ninetieth is the fact that the
the ninety-first is the fact that the
the ninety-second is the fact that the
the ninety-third is the fact that the
the ninety-fourth is the fact that the
the ninety-fifth is the fact that the
the ninety-sixth is the fact that the
the ninety-seventh is the fact that the
the ninety-eighth is the fact that the
the ninety-ninth is the fact that the
the hundredth is the fact that the

1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pennsylvania Railroad Company, Appellant, and Clark Brothers Coal Mining Company, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, of laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

2 Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the District Court of the United States, E. D. Penna.]

WM. W. CRAIG,
Clerk District Court United States,
Eastern District of Pennsylvania.

Allowed by

D. NEWLIN FELL,

Chief Justice of the Supreme Court of
the State of Pennsylvania.

3 Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and The Title Guaranty and Surety Company, as sureties, are held and firmly bound unto Clark Brothers Coal Mining Company, in the full and just sum of Two Hundred and seventy-five thousand (275,000) dollars, to be paid to the said Clark Brothers Coal Mining Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by the presents. Sealed with our seals and dated this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the Supreme Court of Pennsylvania, in a suit depending in said Court, between The Pennsylvania Railroad Company, appellant, and Clark Brothers Coal Mining Company, appellee, a judgment was rendered against the said The Pennsylvania Railroad Company, and the said The Pennsylvania Railroad Company, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Clark Brothers Coal Mining Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Pennsylvania Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

4

THE PENNSYLVANIA RAILROAD
COMPANY,
By GEO. D. DIXON, [SEAL.]
Vice-President.

Attest:

LEWIS NEILSON, *Secretary.*

THE TITLE GUARANTY & SURETY
COMPANY,
By HARRIS J. LATTA, [SEAL.]
Resident Vice-President.

Attest:

WILLIAM RARICH,
Resident Assistant Secretary.

Sealed and delivered in presence of

JOS. RICHARDSON,
As to G. D. D.
GEO. F. NORTON,
As to L. N.

Approved by

D. NEWLIN FELL,
Chief Justice Supreme Court of Pennsylvania.

5 UNITED STATES OF AMERICA, ss:

To Clark Brothers Coal Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Pennsylvania wherein The Pennsylvania Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

D. NEWLIN FELL,
*Chief Justice of the Supreme Court
of Pennsylvania.*

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

On this third day of July, in the year of our Lord one thousand nine hundred and thirteen, personally appeared James P. O'Laughlin before me, the subscriber, Prothonotary and Clerk of the Court of Common Pleas of Clearfield County, Pennsylvania, and makes oath that he delivered a true copy of the within citation to Alfred M. Liveright of the attorneys of record for the said Clark Brothers Coal Mining Company, and read the original to said Liveright.

JAMES P. O'LAUGHLIN,

Sworn to and subscribed the third day of July, A. D. 1913.

JOHN H. MOORE,
Proth'y & Clerk of the Court.

[Seal Court of Common Pleas, Clearfield County.]

6 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 81.

CLARK BROTHERS COAL MINING COMPANY
VS.
THE PENNSYLVANIA RAILROAD COMPANY.

To the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania:

The Pennsylvania Railroad Company, the appellant in the above entitled action, respectfully shows:

The plaintiff, a shipper of bituminous coal over the lines of your petitioner, obtained a judgment in the Court below because of the alleged failure of your petitioner to deliver to it all of the cars which it asserted it would have received had your petitioner made a proper allotment and distribution of those which it had available for distribution among its shippers, and this judgment has since been affirmed by the Supreme Court of Pennsylvania, and a final judgment in said action consequently obtained by the plaintiff therein.

As disclosed by the Record in the case, during the period of the action the defendant was engaged in interstate commerce or transportation, and the bituminous coal transported by it was transported to points both within and without the State of Pennsylvania. Its coal cars were used indiscriminately for intra and interstate shipments, and in making distribution thereof among its shippers, your petitioner made but one distribution, the cars delivered to the shippers being available at their option for shipments to points either within or without the State.

The plaintiff shipped to points both within and without the State, and the additional shipments which it would have made had additional cars been available would have been so made.

Both in the Court below and in the Supreme Court of
7 Pennsylvania your petitioner, as the Record discloses, contended that in making distribution of its coal cars it was subject to the provisions of the Acts of Congress, known as the "Interstate Commerce Acts," and to those alone, and that consequently actions based upon alleged failure to make proper and lawful distribution of its cars were not cognizable in State Courts, but only in the Federal tribunals, this being the result, as your petitioner contended, of the provision contained in Section 9 of the said Interstate Commerce Act to the following effect:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act in any district or circuit court of the United States of competent jurisdiction."

The contention thus made and advanced upon the part of your petitioner was overruled by the Court below and also by the Supreme Court of Pennsylvania.

It was further shown by the testimony in the case that prior to the institution of the action the plaintiff therein had instituted a proceeding before the Commission created by the Interstate Commerce Acts, known as the "Interstate Commerce Commission," to recover damages claimed to have been sustained because of the same discrimination which is complained of in this action, its claim, however, in the proceeding before the Commission being confined to three out of the five mines which were embraced in the action instituted in the State Court. It was further shown that the proceeding before the Commission had been prosecuted and had eventuated in an award in favor of the plaintiff, and your petitioner contended, as the Record of the case discloses, both in the Court below and in the Supreme Court of Pennsylvania that, having regard to the provisions of the Interstate Commerce Act and to the effect therein given to proceedings before the Commission constituted thereby, the plaintiff was precluded from maintaining any action in the State Courts, in so far, at least, as it had to do with the allotment and distribution of cars to the mines of the plaintiff which were embraced in the proceeding before the Commission.

8 This contention was overruled both by the Court below and by the Supreme Court of Pennsylvania. As a result of the overruling of the contentions thus advanced upon behalf of your petitioner, a final judgment has been entered against it in a case in which the decisions both of the lower Court and of the Supreme Court of Pennsylvania have been against a right, privilege or immunity claimed and asserted by your petitioner under the Constitution and Statutes of the United States and in favor of an authority exercised under and pursuant to a law of the State of Pennsylvania, notwithstanding the contention of your petitioner that such authority was not properly exercisable on the ground of its repugnancy to the Constitution and laws of the United States.

Your petitioner being desirous of having such final judgment reviewed by the Supreme Court of the United States, prays that a writ of error for this purpose may be allowed.

And it will ever pray, etc.

THE PENNSYLVANIA RAILROAD
COMPANY,

By GEO. D. DIXON, *Vice President.*

[Seal The Pennsylvania Railroad Company, Incorporated 1846.]

Attest:

LEWIS NEILSON, *Secretary.*

STATE OF PENNSYLVANIA,

County of Philadelphia, ss:

Lewis Neilson, being duly sworn, according to law, deposes and says that he is the Secretary of the Pennsylvania Railroad Com-

pany, the petitioner herein, and that the facts contained and set forth in the above and foregoing petition are true to the best of his knowledge, information and belief.

[Seal Henry E. Cain, Notary Public, Philadelphia, Pa.]

LEWIS NEILSON.

Sworn and subscribed before me this first day of July, 1913.

HENRY E. CAIN,

Notary Public.

Commission expires February 21, 1915.

[Endorsed:] No. 81. January Term, 1913. In the Supreme Court of Pennsylvania, Eastern District. Clark Brothers Coal Mining Co. vs. The Pennsylvania Railroad Co. Petition for Allowance of Writ of Error to Supreme Court of the United States. Francis I. Gowen.

9 In the Supreme Court of the United States, — Term, 1913.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

VS.

CLARK BROTHERS COAL MINING COMPANY, Defendant in Error.

In Error to the Supreme Court of Pennsylvania.

Specifications of Error.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"1. The Court below erred in overruling the defendant's motion to dismiss the case for want of jurisdiction to entertain the same."

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"12. The Court below erred in refusing the defendant's third point, which point was as follows:

"3. The evidence has established that the bituminous coal transported by the defendant during the period of the action was transported from mines located in the State of Pennsylvania to points both within and without the State; that in making distribution of its coal cars among shippers of such coal during the period of the action, the defendant did not make one distribution of cars intended for shipments to points within the State and another one of cars intended for shipments to points without the State, but made but one distribution, leaving the shippers at liberty to use the cars for shipments to points either within or without the State as they might elect. Under these circumstances, the defendant, in respect to the distribution made, was subject to the obligations and prohibitions imposed upon it by the said Acts of Congress, known as the "Interstate Commerce Acts," and to these exclusively, and as actions

for non-observance of obligations or of prohibitions imposed by or embodied in these Acts are cognizable exclusively either by the Interstate Commerce Commission or by the Courts of the United States, there can be no recovery in this action by the plaintiff of the discrimination complained of."

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"13. The Court below erred in refusing the defendant's fourth point, which point was as follows:

"4. The evidence has established that prior to the institution of this action the Interstate Commerce Commission of the United States, acting under and pursuant to the authority conferred upon, and vested in, it by the Acts of Congress, known as the "Interstate Commerce Acts," defined and prescribed the method or system of car distribution which should have been observed and followed by the defendant in this action during the period thereof. As the result of such action by the said Commission, and of the orders previously made by the Commission, which have been given in evidence, defining and prescribing the method of car distribution which the said Interstate Commerce Act enjoined upon carriers subject to its provisions this Court is without jurisdiction to entertain the present action, in so far as it is rested upon the discrimination complained of by the plaintiff, and the plaintiff, consequently is not entitled to recover on this ground."

"Refused."

4. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"14. The Court below erred in refusing the defendant's fifth point, which point was as follows:

"5. The evidence has established that prior to the institution of the present action, to wit, on or about the 5th day of June, 1907, the plaintiff in this action instituted a proceeding against the defendant in this action before the Interstate Commerce Commission of the United States for the purpose of obtaining, inter alia, an award in its favor covering the damages which it complained it had sustained because of the failure of the defendant to properly rate its mines, Falcon Nos. 2, 3 and 4, and to give to them the number of cars which it claimed should have been delivered at these mines if a proper system or method of distributing its cars had been pursued by the defendant, and because of the inadequacy of the defendant's equipment during the period of the present action; that the said proceeding eventuated in two reports and orders promulgated by the said Interstate Commerce Commission on March 7, 1910, and March 11, 1912, respectively, the latter of which made an award of damages in favor of the plaintiff in the said proceeding, being the plaintiff in this action, and against the defendant in said proceeding, being the defendant in this action, covering the loss which the Commission found the plaintiff had sustained because of the failure of the defendant to give to the said Falcon Mines Nos. 2, 3 and 4, the cars which the Commission found should have been delivered to them, and which would have been used for interstate

shipments. Such proceeding and the award of the Commission made therein preclude the plaintiff from maintaining the present action, in so far as it relates to Falcon Mines Nos. 2, 3 and 4, and from recovering herein the loss, if any, which it sustained

11 because of the failure of the defendant to give to the said mines more cars than were delivered at the said mines during the period of the action.' "

"Refused, reserving the legal propositions involved therein.' "

5. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"15. The Court below erred in refusing the defendant's sixth point, which point was as follows:

"6. It appears that in the proceeding instituted before the Interstate Commerce Commission by the plaintiff against the defendant the award made in favor of the plaintiff was based upon and covered the loss which the Commission found the plaintiff had sustained due to the greater cost of producing all the coal mined in the period of this action at Falcon Mines Nos. 2, 3 and 4, because of the failure of the defendant to place a larger number of cars at the mines named than were actually delivered to them. The plaintiff cannot, therefore, in the present action recover the amount of such increased cost.' "

"Refused, reserving the legal propositions involved therein.' "

6. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"16. The Court below erred in refusing the defendant's seventh point, which point was as follows:

"7. The plaintiff cannot recover in this action the damage or loss, if any, sustained as the result of its failure to receive from the defendant cars which would have been used for shipments to points without the State of Pennsylvania. Cars which would have been consigned by the plaintiff to purchasers at destinations outside the State would have been so used, even though the coal loaded therein was sold under contracts providing for delivery to such purchasers f. o. b. cars at the plaintiff's mines.' "

"Refused.' "

7. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"18. The Court below erred in refusing the defendant's ninth point, which point, and the answer of the Court thereto, were as follows:

"9. The evidence has established that the Interstate Commerce Commission has determined that the system or method of ratings pursued by the defendant during the period of the action was a proper and lawful one, and subjected the plaintiff and other shippers to no discrimination or disadvantage, and that the ratings actually given to the plaintiff's mines were fair and proper.

12 This determination by the Commission is binding and conclusive, and the plaintiff cannot, therefore, recover in the present action because of the ratings actually given to their mines.' "

"Answer: 'Refused, for the reason that while the system or method of rating adopted by the defendant company may have

been sanctioned by the Interstate Commerce Commission, the question here was as to whether or not there was discrimination practiced against the plaintiff even under that system or method of rating.' "

8. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"19. The Court below erred in refusing the defendant's eleventh point, which point, and the answer of the Court thereto, were as follows:

"11. There is no evidence which would warrant the jury in finding that the plaintiff was subjected to any unlawful discrimination because of the ratings given to its mines during the period of the action by the defendant.' "

"Answer: 'Refused, for the reason that there is some evidence tending to show an unlawful and unfair discrimination because of the ratings in comparison with the mines of other shippers.' "

FRANCIS I. GOWEN,

H. W. B.

Attorney for Plaintiff in Error.

[Endorsed:] No. —. — Term, 1913. In the Supreme Court of the United States. Pennsylvania Railroad Company Plaintiff in Error, vs. Clark Brothers Coal Mining Company, Defendant in Error. In Error to the Supreme Court of Pennsylvania. Specifications of Error. Francis I. Gowen.

13 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 81.

CLARK BROTHERS COAL MINING COMPANY

VS.

THE PENNSYLVANIA RAILROAD COMPANY.

Upon the representation of counsel it appearing that the Clerk of this Court will not be able to prepare and complete the Transcript of Record in this case within the time limited in the citation, it is hereby this — day of July, 1913, ordered that the time for filing said Transcript of Record in the Supreme Court of the United States be, and the same is, hereby extended until the fifteenth day of October, 1913.

D. NEWLIN FELL.

C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.*Plaintiff's Statement.*

Clark Brothers Coal Mining Company, the plaintiff in the above stated action of trespass, seeks to recover compensation for the loss and damage which it sustained, by reason of the wrongful and unlawful acts of the Pennsylvania Railroad Company, the defendant, and sets forth the following facts upon which it claims to recover.

(1) That the plaintiff is a corporation organized and existing under the laws of Pennsylvania, and has under the name of Clark Brothers & Jacoby, Inc. or as Clark Brothers Coal Mining Co. been engaged in mining, shipping and selling coal from October 16, 1905, having mines situated in the Counties of Clearfield and Indiana, State of Pennsylvania, and having under control by leasehold or ownership a large amount of bituminous coal of high grade and quality. That plaintiff's business was incorporated in 1905 as Clark Bros. & Jacoby, Incorporated, but in February, 1907, by appropriate proceedings, the name was changed to Clark Bros. Coal Mining Company, also a corporation; and all the rights of the plaintiff both under its original and its amended name are herein sought to be enforced. Plaintiff had three mines in Clearfield County known as Falcon numbers 2, 3 and 4 fully equipped, with a physical output capacity of approximately one thousand tons a day, and with an actual output capacity of not less than six hundred tons a day, if given the same pro rata distribution of cars as was awarded to Eureka Mines numbers 7, 16, 22, 27 and 28, and to Standard Mine No. 7, by the defendant.

(2) That the defendant is a common carrier and public highway organized, created and existing under the laws of Pennsylvania by special statute approved the 13th day of March, 1846, and by various special and general statutes amendatory thereof and supplementary thereto passed and approved since that date, and said defendant company owns and controls the Tyrone Division, sometimes
15 known as the Tyrone & Clearfield Division, including the Moshannon Branch Railroad and its several spurs, branches and side lines, and has so controlled and owned them from a period antedating October 15, 1905.

(3) Said Moshannon Branch of the Tyrone Division of defendant's railroad is and was prior to and since October 16th, 1905, the only outlet for the transportation of the said coal owned, leased and controlled by the plaintiff company in connection with its Falcon Mines aforesaid, to the points and places in the State of Pennsylvania where there was and now is a market and ready sale and great de-

mand for its coal; and where the plaintiff had opportunity to sell and did sell considerable amount of the product of its mines, and where it could and would have sold a much larger amount except for the unjust, illegal and discriminatory acts of the defendant company hereinafter stated.

(4) That under the Constitution and laws of this Commonwealth as well as at Common Law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars for the transportation of bituminous coal over its main line and branches, for the accommodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to defendant's main line and branches, and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from the bituminous coal regions tributary to its main line and branches in the Counties of Clearfield, Cambria, Indiana and elsewhere, and to let and hire the same to the plaintiff in this action.

That the defendant company did not as required by law, provide the plaintiff at its mines in Clearfield and Indiana Counties between October 16th, 1905, and April 30th, 1907, such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market during the ordinary conditions and demands of the market for bituminous coal, the amount of coal it could and would have mined, produced and shipped had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market, to points and places within the State of Pennsylvania, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and had transported, had it been furnished by defendant with an adequate and sufficient supply of coal cars for such use and purpose; by reason of which failure in the performance of its duty and legal obligation, the defendant caused the plaintiff to suffer great damage, to wit, damage in the sum of Nineteen Thousand Three Hundred Forty-nine and 28/100 Dollars.

(5) That the mines on the Moshannon Branch of the Tyrone Division of the defendant's railroad or highway, during the period between October 15, 1905, and April 30, 1907, included, inter alia, plaintiff's mines aforesaid, Eurekas Nos. 7, 16, 22, 27 and 28, owned by the Berwind-White Coal Mining Company, and Standard No. 7 owned by L. W. Beyer.

That the mines of the plaintiff, Falcon Nos. 2, 3, and 4, and the mines aforesaid of L. W. Beyer and Berwind-White Coal Mining Co. were operated, equipped and situate generally, in circumstances and under conditions substantially similar; but notwithstanding these facts the defendant company did distribute to the mines of Berwind-White Coal Mining Co. and of Beyer coal cars in number

sufficient to enable them to mine and ship a very large part of their coal and an amount equal to the capacity, and did deny an
17 equal pro rata distribution of coal cars to the plaintiff's mines, and did so unduly and unreasonably refuse to give the plaintiff cars and facilities for transportation of its coal and, did unduly and unreasonably discriminate against the plaintiff and in favor of the said Berwind-White Coal Mining Company and the said L. W. Beyer, in violation of its duty as a common carrier to give and render that equality of service imposed upon it by the laws of this Commonwealth as a common carrier and public highway, and did fail, neglect and refuse to render to the plaintiff the same pro rata service and facilities that it furnished and rendered to said owners or operators of the Eureka and Standard Mines aforesaid.

That between the 16th day of October 1905 and the 30th day of April 1907, the plaintiff received from defendant but 1806 coal cars of a capacity of thirty-five (35) tons each, counting one steel car to be equal to $1\frac{1}{2}$ cars of said capacity; while the defendant distributed to the mines known as Eureka Nos. 7, 16, 22, 27 and 28 and Standard No. 7 cars to the number of 44,778, an average of 7,463 cars to each of said six mines, or 24-79/100 cars to the mines of Berwind-White Coal Mining Company and Beyer, to one (1) car to the mines of Plaintiff.

That between said dates the defendant company did continuously, unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company and L. W. Beyer, owners and operators of the Eureka & Standard Mines hereinbefore enumerated, and against the plaintiff in the distribution of coal cars and in furnishing facilities for transportation in violation of its duty as a common carrier, and did by its undue and unreasonable discrimination prevent the plaintiff from mining, shipping and selling its coal; and did cause the plaintiff to suffer great loss and damage, in that it unlawfully and unjustly deprived the plaintiff from mining, shipping, and selling a large amount of coal, which otherwise it could

18 have mined and would have mined and sold within the State of Pennsylvania, to wit, loss and damage in the sum of Nineteen Thousand Three Hundred Forty-nine and 28/100 Dollars.

(6) Plaintiff further avers that the defendant during the period aforesaid assumed the right to estimate and determine the capacity and rating of the mines of the plaintiff for the production of coal and distribution of cars, and did in fact estimate, fix and publish a capacity with which it credited plaintiff's mines as well as a capacity with which it credited the mines of the Berwind-White Coal Mining Co. L. W. Beyer and other shippers of coal along its main line, divisions and branches; upon the basis of which rating capacity it assumed the right to determine, and did in fact, estimate, determine and fix the percentage of cars which it claimed plaintiff was entitled to have and receive daily out of the total number of cars allotted to the Tyrone & Clearfield Division for the transportation of coal.

That the capacity of plaintiff's mines, Falcon 2, 3 and 4 to produce

and ship coal was at all times much greater than the rating fixed for them by defendant, and it would have been still larger had defendant supplied plaintiff with cars measurably adequate for it to increase its commercial shipments and physical development.

That by reason of defendant's acts in giving plaintiff a lower rating than it should have, plaintiff was subjected to undue and unreasonable prejudice and disadvantage in the number of cars allotted to it by defendant for the transportation of its coal.

Wherefore and whereby defendant did prevent plaintiff from mining, shipping and selling a large quantity of coal; and did cause the plaintiff to suffer great loss and damage, in that it unlawfully and unjustly deprived the plaintiff from mining, shipping and selling a large amount, which otherwise it could have mined and would have mined and sold within the State of Pennsylvania, to wit, loss and damage in the sum of \$19,349.28.

19 (7) And for further cause of action plaintiff avers that the defendant in the year 1905 did refuse and deny to plaintiff the right to place upon the tracks of defendant, and have hauled by it 60 private coal cars which plaintiff had purchased for the purpose of loading coal thereon and placing itself more nearly upon an equality with the Berwind-White Coal Mining Company, the Moshannon Coal Mining Co. and other operators and shippers on the Moshannon Branch aforesaid who enjoyed such advantages; while at the same time and under substantially similar conditions and circumstances, the defendant did permit the Berwind-White Coal Mining Company, the Moshannon Coal Mining Company and other coal operators and shippers as aforesaid to load their coal into private or individual cars, and did then haul said cars so loaded with coal over its, the defendant's line of railroad to market; that as set forth in paragraph four of this statement, the defendant during the period between October 15, 1905 and April 30, 1907, did fail to provide a sufficient and adequate supply of its own cars for the use and accommodation of the plaintiff, and for the transportation of its coal; and that by permitting the plaintiff's competitors hereinbefore referred to, to supplement the car supply of defendant, by coal cars owned or leased by said competitors, and denying a like right and privilege to the plaintiff, the defendant company did continuously, unreasonably and unduly discriminate against plaintiff and in favor of said competitors in furnishing facilities of transportation, in the distribution of coal cars, and in enabling it to place its product upon the market, and did by said undue and unreasonable discrimination prevent the plaintiff from mining, shipping and selling its coal, which otherwise it could and would have mined, sold and shipped to points and places within the State of Pennsylvania; and did thereby cause the plaintiff to suffer great loss and damage, to wit, damage in the sum of Two Thousand Four Hundred (2400) Dollars.

20 (8) As further cause of action plaintiff avers that between October 16, 1905 and April 30, 1907, the defendant did unreasonably and unduly discriminate against the plaintiff in that it did fail and neglect properly to apportion its facilities of trans-

portation, and that it did haul and distribute an undue and excessive proportion of private or individual cars on its Tyrone Division, and on the Moshannon Branch thereof, for the Berwind-White Coal Mining Company, the Moshannon Coal Mining Company, L. W. Beyer and others of plaintiff's competitors, the plaintiff having none of such cars and by reason of defendant's conduct being unable to obtain any for its use on the Pennsylvania Railroad; and the total supply of coal cars for distribution by defendant being inadequate and insufficient as hereinbefore set out, the number of system or commercial cars allottable to the Tyrone Division under defendant's scheme of car distribution was thus unduly diminished, and an unreasonable discrimination in the distribution of coal cars was practiced by the defendant to the prejudice and disadvantage of the plaintiff, which received no share of the allotment of the private cars aforesaid and was made to depend upon the supply of system cars of the defendant for the shipment of its product.

And further in this behalf plaintiff avers that defendant did unreasonably and unduly discriminate against it in the distribution of cars, in that a considerable part of its equipment was assigned to Berwind-White Coal Mining Co., Moshannon Coal Mining Co. L. W. Beyer and other of plaintiff's competitors, for loading therein supply coal to be used by the defendant; which cars being so loaded for defendant were for a part of the period of the action not counted against the distributive share of plaintiff's competitors, and for the remainder of the period were counted in an unlawful and discriminatory manner; whereby the share and number of cars
21 which plaintiff should have received was in a large measure denied to it by defendant, and its output greatly curtailed.

And in this behalf plaintiff also avers that the defendant did unjustly and unreasonably discriminate against the plaintiff during the period stated, in that it did further restrict and diminish the supply of system cars out of which plaintiff's distributive share was almost exclusively allotted, by permitting to ply upon its road a large number of the private cars of the Berwind-White Coal Mining Co., which it, the defendant distributed to the Standard No. 7 Mines owned and operated by L. W. Beyer; whereby the distributive share of system cars which plaintiff should have received was much lessened, and the quantity of coal which plaintiff could and would have mined, and sold and shipped to points and places within the State of Pennsylvania, was much reduced; and the plaintiff was thereby caused to suffer great loss and damage, to wit, damage in the sum of \$19,349.28.

(9) Plaintiff also avers that defendant being a common carrier as aforesaid, and being subject to the duties and obligations hereinbefore specified, owns and controls the Cambria & Clearfield Division of its road, as well as the Cush Creek Branch of said division, and did so own and control said branch and division between October 16, 1905 and April 30, 1907.

That between said dates plaintiff controlled by leasehold and ownership, a large amount of bituminous coal of high grade and quality in the County of Indiana, Pennsylvania; and that it had two mines in said County on the Horton Run Branch, connecting

with the Cush Creek Branch aforesaid, known as Falcon Nos. 5 and 6. Said two mines or openings were equipped to load their product over one tippie, and they had an initial output capacity of one hundred tons per day and later an output capacity of two hundred tons per day if given the same pro rata distribution of cars awarded David E. Williams & Company for mines on the same division owned or controlled by them.

22 That said Cush Creek Branch of the Cambria & Clearfield Division of defendant Company's railroad is the only feasible outlet for the coal owned, leased and controlled by the plaintiff, by which it can or could ship its product from Falcon Mines 5 and 6 to points and places within the State of Pennsylvania, where there was a market and ready sale and demand for its coal, where the plaintiff sold a large amount of the product of its mines, and where it could and would have sold a much larger amount, except for the undue and unreasonable discriminations of the defendant hereafter stated.

That on said Cush Creek Branch of defendant's road between October 16, 1905 and April 30, 1907, there were certain mines owned, operated or controlled by David E. Williams & Co., known as Glenwood Mines 4, 9, and 10, Urey Ridge Mines 1, 2, 3 and 5, and Bellmore No. 1 which were competitive with Falcon mines 5 and 6.

That in the period specified, the defendant did unduly and unreasonably discriminate against the plaintiff to its great prejudice and disadvantage, and in violation of its duty to render equality of service in furnishing transportation facilities, in that defendant did give said Williams & Co. and the mines by them owned, operated or controlled, an inflated rating and a larger proportionate rating than they were entitled to in comparison with plaintiff and its mines; the consequence whereof was that plaintiff failed to obtain the proportionate number of cars to which in right and justice its relative size, capacity and equipment entitled it at the hands of the defendant; whereby defendant prevented plaintiff from mining, shipping and selling a large quantity of coal, and caused the plaintiff great loss and damage, in that it unlawfully and unjustly deprived the plaintiff of mining, shipping and selling a large amount of coal, to wit, 13104.91 tons, which otherwise it could have mined and would have mined and sold within the State of Pennsylvania.

23 Plaintiff also avers that defendant did unduly and unreasonably discriminate against it and in favor of D. E. Williams & Co., and the mines owned, operated or controlled by them, in the distribution of coal cars and in furnishing facilities for transportation in that it did distribute to the said Williams & Co. and their mines coal cars in number sufficient to enable them to mine and ship a very large part of their coal, and did deny an equal pro rata distribution of coal cars to plaintiff's mines, Falcon 5 and 6, and did so unduly and unreasonably deny the plaintiff cars and facilities for transportation of its coal, and did unduly and unreasonably discriminate against the plaintiff and in favor of Wil-

liams & Co., in violation of its duty to render equality of service, and did fail, neglect and refuse to render to plaintiff at its said mines Falcon 5 and 6 the same pro rata service and facilities that it furnished and rendered to its competitors herein named.

Whereby defendant caused the plaintiff great loss and damage in that it unlawfully and unjustly deprived the plaintiff of mining, shipping and selling a large amount of coal, to wit, 13,104.91 tons, which otherwise it could have mined and would have mined and sold within the State of Pennsylvania.

And plaintiff further avers that defendant did also unlawfully and unduly discriminate against it, and did deny it transportation facilities, in that from the autumn of 1905 to the middle of January, 1906, it did spike down the switch connecting the track leading from Falcon 5 and 6 tipple with the tracks of the Horton Run Branch aforesaid; whereby for a period of several months plaintiff was entirely prohibited from shipping any coal from said Falcon 5 and 6, it being a physical impossibility for it to obtain any cars in which to load its coal and the defendant refusing to remedy the wrong so by it inflicted and done. Whereby defendant caused the plaintiff great loss and damage in that it unlawfully

and unjustly deprived the plaintiff of mining, shipping and
24 selling a large amount of coal, to wit 2000 tons, which otherwise it could have mined and would have mined and sold within the State of Pennsylvania, and inflicted upon plaintiff a loss of Six Hundred Dollars.

Plaintiff further avers that defendant did also unlawfully and unreasonably discriminate against it in that what few cars it did allot plaintiff for use at its Falcon 5 and 6 mines were delivered to it irregularly, spasmodically and at uncertain intervals and hours, whereas to its competitors, Williams & Co. aforesaid, distribution was made with much more certainty and regularity, and at a much more advantageous time of day. That as a consequence of such course of conduct on the part of the defendant, the plaintiff's complement of men became disorganized and dissatisfied, and sought employment at the mines of Williams & Co., and the plaintiff was embarrassed and hindered in the production of its coal, so that not only did it mine and ship a smaller quantity than it would have mined but for the undue and unreasonable discrimination practiced against it by the defendant, but the cost of producing what it did mine was thereby greatly increased. Whereby defendant caused the plaintiff great loss and damage in that it unlawfully and unjustly deprived the plaintiff of mining, shipping and selling a large amount of coal, to wit, 13,104.91 tons which otherwise it could have mined and would have mined and sold within the State of Pennsylvania; and unlawfully inflicted upon plaintiff a loss of twenty cents per ton on 7802 tons that it did mine and sell within the State of Pennsylvania.

Wherefore plaintiff seeks herein to recover from defendant for loss and damage sustained by it in connection with its operations known as Falcon No. 5 and Falcon No. 6 as herein narrated the

sum of \$5306.21 with compensation for delay from the time of the loss suffered.

And plaintiff claims that defendant is liable in damages at common law for the causes of action hereinabove set forth, as well as for the violation of duties imposed upon it by the statutes of Pennsylvania hereinbefore referred to, and in addition thereto claims damages

25 by virtue of the Act of the General Assembly of Pennsylvania, approved June 4, 1883, entitled "An act to enforce the provisions of the 17th Article of the Constitution relative to railroads and canals" wherein it is provided that for any violation of the provisions of the said Act the offending company or common carrier shall be liable to the party injured for damages treble the amount of injuries suffered.

Wherefore plaintiff brings this its action to recover for the causes of action averred, the sum of One Hundred and Twenty-five Thousand Dollars, (\$125,000.00).

A. L. COLE

A. M. LIVERIGHT

Att'ys for Pl'ff.

Filed Jan. 22, 1912. John H. Moore, Prothonotary.

26 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Rule on Defendant to Plead.

To Murray & O'Laughlin, Esqs., Attorneys for Defendant:

You will please take notice that plaintiff's statement in above case was filed of record January 22nd, 1912.

Rule is entered on Defendant to plead within thirty days after service hereof, or show cause to the contrary, in default of which the plea of the general issue will be granted as provided by Rule of Court.

(Signed)

A. L. COLE,

A. M. LIVERIGHT,

Attorneys for Plaintiff.

Served on us by copy this 23rd day of January, 1912.

(Signed)

MURRAY & O'LAUGHLIN,

Attorneys for Defendant.

27 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.*Petition to Dismiss Action for Want of Jurisdiction.*

The Pennsylvania Railroad Company, the defendant in the above entitled action, respectfully moves the Court to dismiss the same for the following reasons:

1. It is a corporation organized and existing under the laws of the State of Pennsylvania, owning and operating a line of railroad in that State and also in the States of New York and New Jersey, and is engaged in the transportation of passengers and freight between points in said States, and is, therefore, subject to the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and the Acts amendatory thereof and supplementary thereto.

2. During the period of the present action and prior thereto, it was engaged inter alia, in transporting in interstate commerce coal mined by a large number of mine owners and operators located along its lines within the State of Pennsylvania, among whom was the plaintiff in the present action, and that in conjunction with such transportation, it was also engaged in the transportation of coal exclusively within the State of Pennsylvania for such owners and operators. That for the purpose of enabling shipments to be made both to points beyond and within the State of Pennsylvania it owned, maintained and operated a large number of coal cars which were used by it for both intrastate and interstate shipments, no segregation or apportionment of these cars being made as between the two classes of shipments.

3. During the period of the action and prior thereto, it had in force certain regulations providing for the distribution of its coal cars among shippers desirous of using the same, and in making this distribution it in no wise undertook to limit the use of
28 the cars so delivered to any shipper to either intrastate or interstate shipments, but accepted and transported the cars when loaded to the destinations designated and prescribed by the shippers loading them, without regard to the consideration whether these destinations were points beyond or within the State of Pennsylvania.

4. The Acts to Regulate Commerce above referred to by their terms prohibit unlawful or unjust discrimination in the distribution by any railroad company subject to their provisions of its available equipment, and your petitioner is advised by counsel, and therefore avers, that by reason of the paramount authority possessed by the Congress of the United States in respect to any matter concerning which it is empowered to legislate, the provisions of the said

Acts in relation to such discrimination are controlling, and that the remedies for violation thereof which are prescribed in and by said Acts are consequently exclusive of all others.

5. It results from this, as your petitioner is advised and avers, that actions for the recovery of damages based upon disregard of provisions of the said Acts prohibiting discrimination in the allotment or distribution by a railroad company or carrier of any of its equipment are cognizable solely in the tribunals which the said Acts designate and prescribe as those in which such actions shall be maintained, and these tribunals are the Courts of the United States and the Interstate Commerce Commission, jurisdiction between the two being apportionable as prescribed in the said Acts.

6. Wherefore, your petitioner showing that this Court is without jurisdiction to entertain the present action, prays that an order be made dismissing the same.

THE PENNSYLVANIA RAILROAD
COMPANY,

By W. H. MYERS, *Vice-President.*

Attest:

LEWIS NEILSON, *Secretary.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Lewis Neilson, being duly sworn, according to law, deposes and says: That he is the Secretary of The Pennsylvania Railroad Company, the defendant in the above entitled action. That the facts set forth in the above motion are true, and that the said motion has not been made for the purpose of delay.

(Signed)

LEWIS NEILSON.

Sworn to and subscribed before me this twenty-ninth day of October A. D. 1912.

HENRY E. CAIN,
Notary Public.

Commission expires February 21, 1915.

29 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Now November 4, 1912, Motion to dismiss is overruled. Exception noted for Defendant.

By the Court.

ALLISON O. SMITH, *P. J.*

Filed Nov. 4, 1912. John H. Moore, Prothonotary.

30 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY.

Motion to Amend Statement of Claim.

And now, November 13th, 1912, the Plaintiff moves the Court for leave to amend the Plaintiff's Statement of claim by striking out therefrom the words "to points and places within the State of Pennsylvania," and language of like import, wherever the same appears therein, and to increase the amount claimed as damages at the end of each cause of action laid so that the same shall read \$100,000.00, and to amend the total damages claimed so that the same shall read \$200,000.00; and that it may have leave to write out and file a formal declaration as so amended on or before November 18th, 1912.

A. M. LIVERIGHT,

A. L. COLE,

Att'ys for Pl'ffs.

31 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY.

Motion to Continue and Defendant's Plea of Surprise.

Now November 13th 1912, Defendant by its Counsel pleads surprise to the foregoing motion granted and amendment allowed and asks the Court to continue this case until next term for the reason the amendment introduces new and additional issues which defendant is not prepared now to defend and will require the additional time to prepare and present its defense.

MURRAY & O'LAUGHLIN,

Of Counsel for Defendant.

Filed Nov. 15, 1912. John H. Moore, Prothonotary.

Plea of Surprise.

Now November 15th 1912, defendant by its counsel pleads surprise to the Plaintiff's Amended Statement filed this day and asks the Court to continue this case until next term. The amended

statement introduces new and additional issues which defendant is not now prepared to go to trial on and will require this additional time in order to prepare and present such defense as is required to this amended statement.

MURRAY & O'LAUGHLIN,
Of Counsel for Defendant.

32 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Order Granting Motion to Amend.

Now November 13, 1912, the foregoing motion is hereby granted and amendment allowed as prayed for, to which action of the Court on request of counsel for Defendant exception is noted and bill sealed.

By the Court,

ALLISON O. SMITH, P. J.

33 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Order of Court Overruling Defendant's Plea of Surprise.

Now November 18, 1912 the foregoing plea of surprise having been filed and argued before the Court on motion for continuing the cause until next term and the same is hereby overruled. At request of Counsel for Defendant exception is noted and bill sealed.

By the Court.

ALLISON O. SMITH, P. J.

Filed Nov. 15, 1912. John H. Moore, Prothonotary.

34 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Amended Statement.

Clark Brothers Coal Mining Company, the plaintiff in the above stated action of trespass, seeks to recover compensation for the loss and damage which it sustained, by reason of the wrongful and unlawful acts of the Pennsylvania Railroad Company, the defendant, and sets forth the following facts upon which it claims to recover.

(1) That the plaintiff is a corporation organized and existing under the laws of Pennsylvania, and has under the name of Clark Brothers & Jacoby, Inc. or as Clark Brothers Coal Mining Co. been engaged in mining, shipping and selling coal from October 16, 1905, having mines situated in the Counties of Clearfield and Indiana, State of Pennsylvania, and having under control by leasehold or ownership a large amount of bituminous coal of high grade and quality. That plaintiff's business was incorporated in 1905 as Clark Bros. & Jacoby, Incorporated, but in February 1907, by appropriate proceedings, the name was changed to Clark Bros. Coal Mining Company, also a corporation; and all the rights of the plaintiff both under its original and its amended name are herein sought to be enforced. Plaintiff had three mines in Clearfield County known as Falcon Numbers 2, 3 and 4 fully equipped, with a physical output capacity of approximately one thousand tons a day, and with an actual output capacity of not less than six hundred tons a day, if given the same pro rata distribution of cars, as was awarded to Eureka Mines numbers 7, 16, 22, 27 and 28, and to Standard Mine No. 7, by the defendant.

(2) That the defendant is a common carrier and public highway organized, created and existing under the laws of Pennsylvania by special statute approved the 13th day of March 1846, and by various special and general statutes amendatory thereof and supplementary thereto passed and approved since that date; and said defendant company owns and controls the Tyrone Division, sometimes known as the Tyrone & Clearfield Division including the Moshannon Branch Railroad and its several spurs, branches and side lines, and has so controlled and owned them from a period antedating October 15, 1905.

(3) Said Moshannon Branch of the Tyrone Division of defendant's railroad is and was prior to and since October 16th, 1905, the only outlet for the transportation of the said coal owned, leased and controlled by the plaintiff company in connection with its Falcon Mines aforesaid, to the points and places in the State of Pennsylvania, where there was and now is a market and ready sale and great

demand for its coal; and where the plaintiff had opportunity to sell and did sell considerable amount of the product of its mines, and where it could and would have sold a much larger amount except for the unjust, illegal and discriminatory acts of the defendant company hereinafter stated.

(4) That under the Constitution and laws of this Commonwealth as well as at Common Law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, and adequate and sufficient supply of coal cars for the transportation of bituminous coal over its main line and branches, for the accommodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to defendant's main line and branches, and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from the bituminous coal regions tributary to its main line and branches to the Counties of Clearfield, Cambria, Indiana and elsewhere, and to let and hire the same to the plaintiff in this action.

36 That the defendant company did not as required by law, provide the plaintiff at its mines in Clearfield and Indiana Counties between October 16th 1905, and April 30th 1907, such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market during the ordinary conditions and demands of the market for bituminous coal, the amount of coal it could and would have mined, produced and shipped had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and had transported, had it been furnished by defendant with an adequate and sufficient supply of coal cars for such use and purpose; by reason of which failure in the performance of its duty and legal obligation, the defendant caused the plaintiff to suffer great damage, to wit, damage in the sum of One Hundred Thousand Dollars.

(5) That the mines on the Moshannon Branch of the Tyrone Division of the defendant's railroad or highway, during the period between October 15, 1905 and April 30, 1907, included, inter alia, plaintiff's mines aforesaid, Eurekas Nos. 7, 16, 22, 27 and 28, owned by the Berwind-White Coal Mining Company, and Standard No. 7 owned by L. W. Beyer.

That the mines of the plaintiff, Falcon Nos. 2, 3 and 4 and the mines aforesaid of L. W. Beyer and Berwind-White Coal Mining Co. were operated, equipped and situate generally in circumstances and under conditions substantially similar; but notwithstanding these facts the defendant company did distribute to the mines of Berwind-White Coal Mining Co. and of Beyer, coal cars in number sufficient to enable them to mine and ship a very large part of their coal and an amount equal to their capacity, and did deny an equal pro rata

37 distribution of coal cars to the plaintiff's mines, and did so unduly and unreasonably refuse to give the plaintiff cars and facilities for transportation of its coal, and did unduly and unreasonably discriminate against the plaintiff and in favor of the said Berwind-White Coal Mining Company and the said L. W. Beyer, in violation of its duty as a common carrier to give and render that equality of service imposed upon it by the laws of this Commonwealth as a common carrier and public highway, and did fail, neglect and refuse to render to the plaintiff the same pro rata service and facilities that it furnished and rendered to said owners or operators of the Eureka and Standard Mines aforesaid.

That between the 16th day of October, 1905 and the 30th day of April, 1907, the plaintiff received from defendant but 1806 coal cars of a capacity of thirty-five (35) tons each, counting one steel car to be equal to $1\frac{1}{2}$ cars of said capacity; while the defendant distributed to the mines known as Eureka Nos. 7, 16, 22, 27 and 28 and Standard No. 7, cars to the number of 44,778, an average of 7463 cars to each of said six mines, or 24-79/100 cars to the mines of Berwind-White Coal Mining Company and Beyer, to one (1) car to the mines of plaintiff.

That between said dates the defendant company did continuously, unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company and L. W. Beyer, owners and operators of the Eureka & Standard Mines hereinbefore enumerated, and against the plaintiff in the distribution of coal cars and in furnishing facilities for transportation in violation of its duty as a common carrier, and did by its undue and unreasonable discrimination prevent the plaintiff from mining, shipping and selling its coal; and did cause the plaintiff to suffer great loss and damage, in that it unlawfully and unjustly deprived the plaintiff from mining, shipping, and selling a large amount of coal, which otherwise it could have mined and would have mined and sold, to wit, the loss and damage in the sum of One Hundred Thousand Dollars.

38 (6) Plaintiff further avers that the defendant during the period aforesaid assumed the right to estimate and determine the capacity and rating of the mines of the plaintiff for the production of coal and distribution of cars, and did in fact estimate, fix and publish a capacity with which it credited plaintiff's mines, as well as a capacity with which it credited the mines of the Berwind-White Coal Mining Co., L. W. Beyer and other shippers of coal along its main line, divisions and branches; upon the basis of which rating capacity it assumed the right to determine, and did in fact estimate, determine and fix the percentage of cars which it claimed plaintiff was entitled to have and receive daily out of the total number of cars allotted to the Tyrone & Clearfield Division for the transportation of coal.

That the capacity of plaintiff's mines, Falcon 2, 3 and 4 to produce and ship coal was at all times much greater than the rating fixed for them by defendant, and it would have been still larger had defendant supplied plaintiff with cars measurably adequate for it to increase its commercial shipments and physical development.

That by reason of defendant's acts in giving plaintiff a lower rating than it should have, plaintiff was subjected to undue and unreasonable prejudice and disadvantage in the number of cars allotted to it by defendant for the transportation of its coal.

Wherefore and whereby defendant did prevent plaintiff from mining, shipping and selling a large quantity of coal; and did cause the plaintiff to suffer great loss and damage, in that it unlawfully and unjustly deprived the plaintiff from mining, shipping and selling a large amount, which otherwise it could have mined and would have mined and sold, to wit, loss and damage in the sum of One Hundred Thousand Dollars.

(7) And for further cause of action plaintiff avers that the defendant in the year 1905 did refuse and deny to plaintiff the right to place upon the tracks of defendant, and have hauled by it 39 60 private coal cars which plaintiff had purchased for the purpose of loading coal thereon and placing itself more nearly upon an equality with the Berwind-White Coal Mining Company, the Moshannon Coal Mining Co. and other operators and shippers on the Moshannon Branch aforesaid who enjoyed such advantages; while at the same time and under substantially similar conditions and circumstances, the defendant did permit the Berwind-White Coal Mining Company, the Moshannon Coal Mining Company and other coal operators and shippers as aforesaid to load their coal into private or individual cars, and did then haul said cars so loaded with coal over its, the defendant's line of railroad to market; that as set forth in paragraph four of this statement, the defendant during the period between October 15, 1905 and April 30, 1907, did fail to provide a sufficient and adequate supply of its own cars for the use and accommodation of the plaintiff, and for the transportation of its coal and that by permitting the plaintiff's competitors hereinbefore referred to, to supplement the car supply of defendant, by coal cars owned or leased by said competitors, and denying a like right and privilege to the plaintiff, the defendant company did continuously, unreasonably and unduly discriminate against plaintiff and in favor of said competitors in furnishing facilities of transportation, in the distribution of coal cars, and in enabling it to place its product upon the market, and did by said undue and unreasonable discrimination prevent the plaintiff from mining, shipping and selling its coal, which otherwise it could and would have mined, sold and shipped; and did thereby cause the plaintiff to suffer great loss and damage, to wit, damage in the sum of One Hundred Thousand Dollars.

(8) As further cause of action, plaintiff avers that between October 16, 1905 and April 30, 1907, the defendant did unreasonably and unduly discriminate against the plaintiff in that it did fail and neglect properly to apportion its facilities of transportation, 40 and that it did haul and distribute an undue and excessive proportion of private or individual cars on its Tyrone Division, and on the Moshannon Branch thereof, for the Berwind-White Coal Mining Company, the Moshannon Coal Mining Company, L. W. Beyer and others of plaintiff's competitors, the plaintiff having none of such cars and by reason of defendant's conduct

being unable to obtain any for its use on the Pennsylvania Railroad; and the total supply of coal cars for distribution by defendant being inadequate and insufficient as hereinbefore set out, the number of system or commercial cars allottable to the Tyrone Division under defendant's scheme of car distribution was thus unduly diminished, and an unreasonable discrimination in the distribution of coal cars was practiced by the defendant to the prejudice and disadvantage of the plaintiff, which received no share of the allotment of the private cars aforesaid and was made to depend upon the supply of system cars of the defendant for the shipment of its product.

And further in this behalf plaintiff avers that defendant did unreasonably and unduly discriminate against it in the distribution of cars, in that a considerable part of its equipment was assigned to Berwind-White Coal Mining Co., Moshannon Coal Mining Co., L. W. Beyer and other of Plaintiff's competitors, for loading therein supply coal to be used by the defendant; which cars being so loaded for defendant were for a part of the period of the action not counted against the distributive share of plaintiff's competitors, and for the remainder of the period were counted in an unlawful and discriminatory manner; whereby the share and number of cars which plaintiff should have received was in a large measure denied to it by defendant, and its output greatly curtailed.

And in this behalf plaintiff also avers that the defendant did unjustly and unreasonably discriminate against the plaintiff during the period stated, in that it did further restrict and diminish the
41 supply of system cars out of which plaintiff's distributive share was almost exclusively allotted, by permitting to ply upon its road a large number of the private cars of the Berwind-White Coal Mining Co., which it, the defendant distributed to the Standard No. 7 Mine owned and operated by L. W. Beyer; whereby the distributive share of system cars which plaintiff should have received was much lessened, and the quantity of coal which plaintiff could and would have mined, and sold and shipped, was much reduced; and the plaintiff was thereby caused to suffer great loss and damage, to wit, damage in the sum of One Hundred Thousand Dollars.

(9) Plaintiff also avers that defendant being a common carrier as aforesaid, and being subject to the duties and obligations hereinbefore specified, owns and controls the Cambria & Clearfield Division of its road, as well as the Cush Creek branch of said division, and did so own and control said branch and division between October 16, 1905, and April 30, 1907.

That between said dates plaintiff controlled by leasehold and ownership, a large amount of bituminous coal of high grade and quality in the County of Indiana, Pennsylvania; and that it had two mines in said County on the Horton Run branch, connecting with the Cush Creek branch aforesaid, known as Falcon Nos. 5 and 6. Said two mines or openings were equipped to load their product over one tipple, and they had an annual output capacity of one hundred tons per day and later an output capacity of two hundred tons per day if given the same pro rata distribution of cars awarded David

E Williams & Company for mines on the same division owned or controlled by them.

That said Cush Creek Branch of the Cambria & Clearfield Division of defendant company's railroad is the only feasible outlet for the coal owned, leased and controlled by the plaintiff, by which it can or could ship its product from Falcon Mines 5 and 6 to points
42 and places where there was a market and ready sale and demand for its coal, where the plaintiff sold a large amount of the product of its mines, and where it could and would have sold a much larger amount, except for the undue and unreasonable discrimination of the defendant hereinafter stated.

That on said Cush Creek branch of defendant's road between October 16, 1905 and April 30, 1907, there were certain mines owned, operated or controlled by David E. Williams & Co., known as Glenwood mines 4, 9 and 10, Urey Ridge mines, 1, 2, 3 and 5, and Bellmore No. 1, which were competitive with Falcon mines 5 and 6.

That in the period specified, the defendant did unduly and unreasonably discriminate against the plaintiff to its great prejudice and disadvantage, and in violation of its duty to render equality of service in furnishing transportation facilities, in that defendant did give said Williams & Co. and the mines by them owned, operated or controlled, an inflated rating and a larger proportionate rating than they were entitled to in comparison with plaintiff and its mines; the consequence whereof was that plaintiff failed to obtain the proportionate number of cars to which in right and justice its relative size, capacity and equipment entitled it at the hands of the defendant; whereby defendant prevented plaintiff from mining, shipping and selling a large quantity of coal, and caused the plaintiff great loss and damage, in that it unlawfully and unjustly deprived the plaintiff of mining, shipping and selling a large amount of coal which otherwise it could have mined and would have mined and sold.

Plaintiff also avers that defendant did unduly and unreasonably discriminate against it and in favor of D. E. Williams & Co., and the mines owned, operated or controlled by them, in the distribution of coal cars and in furnishing facilities for transportation in that it did distribute to the said Williams & Co. and their mines coal cars
43 in number sufficient to enable them to mine and ship a very large part of their coal, and did deny an equal pro rata distribution of coal cars to plaintiff's mines, Falcon 5 and 6 and did so unduly and unreasonably deny the plaintiff cars and facilities for transportation of its coal, and did unduly and unreasonably discriminate against the plaintiff and in favor of Williams & Co., in violation of its duty to render equality of service, and did fail, neglect and refuse to render to plaintiff at its said mines Falcon 5 and 6 the same pro rata service and facilities that it furnished and rendered to its competitors herein named.

Whereby defendant caused the plaintiff great loss and damage in that it unlawfully and unjustly deprived the plaintiff of mining, shipping and selling a large amount of coal which otherwise it could have mined and would have mined and sold.

And plaintiff further avers that defendant did also unlawfully

and unduly discriminate against it, and did deny it transportation facilities, in that from the autumn of 1905 to the middle of January, 1906, it did spike down the switch connecting the track leading from Falcon 5 and 6 tippie with the tracks of the Horton Run branch aforesaid; whereby for a period of several months plaintiff was entirely prohibited from shipping any coal from said Falcon 5 and 6, it being a physical impossibility for it to obtain any cars in which to load its coal and the defendant refusing to remedy the wrong so by it inflicted and done. Whereby defendant caused the plaintiff great loss and damage in that it unlawfully and unjustly deprived the plaintiff of mining, shipping and selling a large amount of coal which otherwise it could have mined and would have mined and sold, and inflicted upon plaintiff a loss of Three Thousand Dollars.

Plaintiff further avers that defendant did also unlawfully and unreasonably discriminate against it in that what few cars it did allot plaintiff for use at its Falcon 5 and 6 mines were
44 delivered to it irregularly, spasmodically and at uncertain intervals and hours, whereas to its competitors, Williams & Co. aforesaid, distribution was made with much more certainty and regularity, and at a much more advantageous time of day. That as a consequence of such course of conduct on the part of the defendant, the plaintiff's complement of men became disorganized and dissatisfied, and sought employment at the mines of Williams & Co., and the plaintiff was embarrassed and hindered in the production of its coal, so that not only did it mine and ship a smaller quantity than it would have mined but for the undue and unreasonable discrimination practiced against it by the defendant, but the cost of producing what it did mine was thereby greatly increased. Whereby defendant caused the plaintiff great loss and damage in that it unlawfully and unjustly deprived the plaintiff of mining, shipping and selling a large amount of coal which otherwise it could have mined and would have mined and sold; and unlawfully inflicted upon plaintiff a loss of twenty cents per ton on all the tonnage that it did mine and sell.

Wherefore plaintiff seeks herein to recover from defendant for loss and damage sustained by it in connection with its operations known as Falcon No. 5 and Falcon No. 6, as herein narrated the sum of Twenty Thousand Dollars, with compensation for delay from the time of the loss suffered.

And plaintiff claims that defendant is liable in damages at common law for the causes of action hereinabove set forth, as well as for the violation of duties imposed upon it by the statutes of Pennsylvania hereinbefore referred to, and in addition thereto claims damages by virtue of the Act of the General Assembly of Pennsylvania, approved June 4, 1883, entitled "An Act to enforce the provisions of the 17th Article of the Constitution relative to railroads and canals" wherein it is provided that for any violation of the provisions of the said Act the offending company or common
45 carrier shall be liable to the party injured for damages treble the amount of injuries suffered.

Wherefore plaintiff brings this its action to recover for the causes of action averred, the sum of Two Hundred Thousand Dollars.

A. L. COLE,
A. M. LIVERIGHT,
Att'ys for Pl'ff.

Filed Nov. 15, 1912. John H. Moore, Prothonotary.

46 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Demurrer to Plaintiff's Amended Statement of Claim.

And now, November 16th, 1912, comes The Pennsylvania Railroad Company, the defendant in the above entitled action, by its counsel, Murray & O'Laughlin, Esquires, and says that the plaintiff's statement of claim is not sufficient in law to maintain the plaintiff's action, and this defendant demurs thereto, and in support of such demurrer assigns the following reasons:

(1) That the statement of claim is invalid in that it shows two distinct causes of action, the first being a claim for single damages based upon the alleged failure of the defendant to perform its alleged duty of "furnishing and providing at all times during the ordinary conditions and demands of the bituminous coal trade an adequate and sufficient supply of coal cars for the transportation of bituminous coal over its main line and branches for the accommodation and use of persons, firms and corporations engaged in mining and producing bituminous coal in the region tributary to the defendant's main line and branches"; the second being a claim for treble damages based upon alleged discrimination on the part of the defendant in violation of the provisions of the Act of June 4, 1883, P. L. 72.

47 (2) That the statement of claim is invalid in that it shows three distinct causes of action, the first being a claim for single damages based upon the alleged failure of the defendant to perform its alleged duty of "furnishing and providing at all times during the ordinary conditions and demands of the bituminous coal trade an adequate and sufficient supply of coal cars for the transportation of bituminous coal over its main line and branches for the accommodation and use of persons, firms and corporations engaged in mining and producing bituminous coal in the region tributary to the defendant's main line and branches"; the second being a claim for treble damages based upon alleged discrimination on the part of the defendant in violation of the provisions of the Act of June 4, 1883, P. L. 72; the third being a claim for single damages for alleged discrimination under the common law.

(3) That it appears from the statement of claim that the plaintiff seeks to recover because of bituminous coal which it alleges it could and would have shipped via the railroad of the defendant to points outside of the State of Pennsylvania, and which would accordingly have been transported in interstate commerce; and this being so, the plaintiff's only remedy is by proceeding in the tribunals designated and prescribed by the various acts of the Congress of the United States, customarily entitled the Act to Regulate Commerce, and the acts amendatory thereof and supplementary thereto, as those in which such actions should be maintained, which tribunals are the courts of the United States and the Interstate Commerce Commission, jurisdiction between the two being apportionable as prescribed in the said acts. Accordingly this State court has no jurisdiction to hear and determine the causes of action alleged in plaintiff's amended statement of claim.

MURRAY & O'LAUGHLIN,
Counsel for Defendant.

48 COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Lewis Neilson being duly sworn according to law doth depose and say that he is Secretary the defendant named in the foregoing demurrer and on its behalf he deposes and says that the said demurrer is not introduced for delay.

LEWIS NEILSON.

Sworn to and subscribed before me this 15th day of November,
A. D. 1912.

HENRY E. CAIN,
Notary Public.

Commission expires February 21, 1915.

Filed Nov. 16, 1912. John H. Moore, Prothonotary.

16 November 1912, served on us by copy, also notice of filing served.

A. L. COLE,
A. M. LIVERIGHT,
Att'ys for Pl'ff.

49 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
VS.

PENNSYLVANIA RAILROAD COMPANY.

Motion to Strike off Demurrer.

And now, Nov. 18th, 1912, the Pl'ff by its Att'ys moves to strike off the Demurrer filed by Def't on Nov. 16th, 1912, for the following reasons:

1. The Def't having filed a plea of the general issue which is still of record the demurrer is too late.
2. The Def't by taking an exception to the filing of the amended statement exhausted its rights in the premises.
3. If the Court should decline so to do the Pl'ffs then move that the demurrer be overruled.

LIVERIGHT,
 COLE,
Att'ys for Pl'ff.

Endorsed: "Motion to strike off demurred." "Granted by the Court." Filed Nov. 18, 1912. John H. Moore, Prothonotary.

50 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

Defendant's Pleas.

And now, to wit, this 18th day of November, A. D. 1912, comes The Pennsylvania Railroad Company, the defendant in the above entitled action, by its counsel, Murray & O'Laughlin, Esquires, and pleads:

- (1) Not guilty.
- (2) The Statute of Limitations.
- (3) And for a further plea in this behalf the said defendant says that the plaintiff ought not to have or maintain its action because it says:

That heretofore, to wit, on or about the twenty-fifth day of June, 1907, the plaintiff herein instituted a proceeding before the Interstate Commerce Commission of the United States against the defendant in the present action, alleging that the defendant in the said proceeding, in the period of time covered by the present action, had in the distribution of its coal cars which were available for the shipment of bituminous coal discriminated against the complainant in the said proceeding, the plaintiff in the present action, and had neglected and failed to give to it the cars which under a proper system of distribution it would have been entitled to receive, and further alleging that the available car equipment of the defendant in the proceeding had been inadequate and insufficient to meet the demands of its shippers and of the complainant in the proceeding, and claiming damages on account thereof.

That thereafter, to wit, on the seventh day of March, 1910, the said Interstate Commerce Commission of the United States, acting under and by virtue of the authority conferred upon it by the Act of Congress customarily known and designated as the "Act to Regu-

late Commerce," and the Acts amendatory thereof and supplementary thereto, made an order wherein and whereby it found that the system or method of distribution of its available coal car equipment pursued by the defendant in the proceeding throughout the period of the action had not conformed to the obligations devolved upon the defendant by the said Acts of Congress, and had subjected the complainant in the proceeding to discrimination forbidden by the said Acts, which said order further required the defendant in the said proceeding to put into effect a system of distribution which should accord with that defined and prescribed by the terms of the said order.

And thereafter, to wit, on the eleventh day of March A. D. 1912, the said Interstate Commerce Commission made a further
51 order in the said proceeding in and by the terms of which the damages were determined and assessed which the said Commission found should be paid by the defendant in the said proceeding, being the defendant in the present action, to the complainant in the said proceeding, being the plaintiff in the present action, for and on account of the matters and things complained of in said proceeding, and payment thereof was directed to be made by the said defendant to said complainant.

And the defendant brings here into Court duly authenticated copies of the complaint filed in the said proceeding before the said Interstate Commerce Commission and of the decision and orders of the said Commission made therein, and tenders formal proof thereof.

Wherefore it prays judgment whether the plaintiff ought to have or maintain its action against it.

MURRAY & O'LAUGHLIN,
Of Counsel for Defendant.

Filed Nov. 18, 1912. John H. Moore, Prothonotary.

52 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Testimony.

J. O. CLARK, called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?

A. At Glen Campbell, Pennsylvania.

Q. What position or office do you hold with the Clark Brothers Coal Mining Company,

A. Its President.

Q. When was that Company organized?

A. The Company begun business October 16, 1905.

Q. Under what name?

A. Clark Brothers & Jacoby Incorporated.

Q. How did it become Clark Brothers Coal Mining Company?

A. After Mr. Jacoby retired from the Company we had the title changed.

Q. By process of law?

A. By process of law through the State Department.

Q. Was there any difference in the two concerns except the change of the name?

A. None whatever, except the retirement of Mr. Jacoby.

Q. As a stockholder?

A. As a stockholder, yes sir.

Q. State whether or not the Clark Brothers Coal Mining Company owned and succeeded to all the rights of Clark Brothers & Jacoby Incorporated?

A. They did.

53 Q. Are you familiar with the business conditions and operating conditions at the various mines of this Company?

A. Yes sir, in a general way.

Q. What conditions obtained at Falcons 2, 3 and 4 between October 16th, 1905 and May 1st 1907 with reference to car supply?

A. It was very bad. Very poor car supply. Very inadequate.

Q. Do you know what proportion of your capacity you received in cars?

A. I don't know that, but I would say it was a very small proportion of our maximum physical capacity.

Q. Do you know what your rating was at the time Jacoby & Company sold to Clark Brothers & Jacoby?

A. At which mine?

Q. No. 2?

A. I would say that it was 10 cars.

Q. Do you know what it was before the purchase in tons per diem?

A. I do not.

Q. You say the car supply was very poor. Explain that further; were there days when you got all you wanted and other days when you didn't?

A. No sir, I don't think there was ever a day that we got all we wanted. There were many days we didn't get a single car when other mines around us were working.

Q. Whose mines were they?

A. The mines of the Berwind-White Coal Mining Company. There was one time, according to our reports, we only worked about 13 hours in 13 days and another time when we worked 7 or 8 hours in 9 days, with the result that when we would resume operations we had few or no men.

Q. To what was that idleness due?

A. Lack of cars.

Q. Was that the only cause?

A. That is the only cause that I know, yes sir.

54 Q. What effort did you make to change the condition of car supply?

A. We made every effort that we could think of in the way of writing the railroad officials and by personal interviews.

Q. How often did you, personally, write the officials on the subject?

A. A great number of times. The correspondence will show that.

Q. Did you write as much as once a month?

A. Yes, indeed, it would come nearer it if I said once a day.

Q. To whom did you write on the subject?

A. I wrote Mr. Michael Trump, Superintendent of Transportation. Mr. J. K. Johnston. Mr. E. J. Cleve.

Q. Did you call their attention to these conditions you have narrated?

A. Most vigorously, yes sir.

Q. What relief, if any, did you get?

A. Absolutely none.

Q. State whether or not your car supply was improved?

A. Not a particle.

Q. State whether or not there were periods at which you got no cars at your mines two or three consecutive days?

A. Yes, as many as five and six and more days.

Q. Consecutively?

A. Yes sir.

Q. State whether or not that situation was brought to the attention of the defendant?

A. Yes sir, it was.

Q. To what officers of the defendant?

A. To most of them that I have named, Mr. Trump, Mr. Johnston and Mr. Cleve.

Q. Mr. Cleve was concerned with what Branch?

A. With the Cambria & Clearfield Branch.

55 Q. And where was he located?

A. At Cresson, Pennsylvania.

Q. As to what mine did you correspond with him?

A. I corresponded with him in regard to the Falcon No. 5 and 6 mines.

Q. Did he have anything to do with Nos. 2, 3 and 4?

A. No sir.

Q. State whether or not during the period of this action your Company had business that it could have shipped coal on that it didn't ship?

A. Yes sir, we had.

Q. Did you have contracts?

A. Very few contracts. We were afraid to make contracts with the limited car supply.

Q. State whether or not you had opportunities to make contracts?

A. Yes, we had plenty of opportunities to make contracts.

Q. Up to how much of your physical ability to load and ship coal did you have the ability to sell the coal?

Q. Well I would say we could have sold more of that coal than we could have produced during this period, if we would have had a regular adequate supply of cars.

Q. What effect did the irregular car supply have upon your trade?

A. A ruinous effect.

Q. How did that come about?

A. If we sold coal to a customer and it was necessary for him to wait a week or ten days or two weeks before we could make shipment, of course he wouldn't want to do much more business with us. It is necessary and the trade demands a regular supply of cars, supply of coal.

Q. State whether it is a trade possibility to store bituminous coal at the mines and then load it on to the railroad cars as they come in?

A. No sir, that is not feasible.

Q. Is it done any where that you know of?

A. Not to my knowledge.

Q. Do you know how efforts were made at the mines to get cars day by day?

A. We instructed our different superintendents to order cars daily.

Q. Do you know whether that was done?

A. I have every reason to think it was. I didn't see it done.

Q. Did you have daily reports from the mines?

A. Yes sir.

Q. State whether or not they showed the cars were ordered or not?

A. No sir, I don't believe those daily reports showed that.

Q. Who had charge of that department of the business?

A. J. H. Miller had charge of that department at Smoke Run and Miss Ida Murray had charge of the work at Glen Campbell.

Q. What kind of coal did you have in these several operations?

A. The Moshannon coal was a very superior grade of coal. The "C Prime" coal at Glen Campbell was not of as good quality, but it was a fair average quality of coal.

Q. What prices did the Nos. 2, 3 and 4 coal command in the market?

A. I should say that we received any where from \$1.15 to \$1.75 between this period, during this period.

Q. That was the range of prices?

A. There might have been a small quantity sold at lower prices.

Q. \$1.75 was the top most price?

A. I would think so, yes sir.

Q. What prices obtained at Nos. 5 and 6?

A. I would say from \$1.05 to \$1.35.

Q. State whether or not this period covered by the action now trying was one of normal coal conditions?

- A. Yes sir, it was, but we had very good times.
- Q. You had good times?
- A. Yes sir.
- Q. And normal conditions?
- A. Yes sir.
- Q. Where is No. 5 operation?
- A. No. 5 operation is in Indiana County.
- Q. On what branch?
- A. On the Cush Creek Branch of the Pennsylvania Railroad.
- Q. Where does the Cush Creek Branch diverge from the main line?
- A. At Cush Creek Junction I believe.
- Q. On what run or branch was your mine situated?
- A. On Horton Run.
- Q. Horton Run?
- A. Yes sir.
- Q. Is that a branch of the Cush Creek Branch?
- A. Yes sir.
- Q. What other mines are thereon located?
- A. The Indiana Coal Company. Indiana No. 8. Indiana No. 2, and Indiana No. 3 I believe.
- Q. When was this branch built?
- A. About the year 1902.
- Q. When was No. 5 mine opened?
- A. No. 5 mine was opened during the summer and fall of 1905, but was ready to ship coal in December, 1905.
- Q. State whether or not you had any difficulty with the Railroad Company in getting a switch connection with No. 5 mine?
- A. We had difficulty in getting the siding put into operation. We owned the switch and the siding.
- Q. What difficulties did you have?
- 58 A. We had a good bit of difficulty. It seemed that we couldn't get it put into operation by Mr. Cleve, the Division Superintendent. We discussed the matter with Mr. Atterbury, in Philadelphia, and his manner was so offensive that I left the office before the interview was over. He said if we wanted cars to have our lawyers see their lawyers, and just as disagreeable way as it could be said, and he says I am through with you gentlemen and at that time I left the office.
- Q. At that time how long had you been trying to get the branch in commission?
- A. That was about the first week in January that we had the interview with Mr. Atterbury and I should say the first time we asked Mr. Cleve to put that siding into commission was about Christmas time.
- Q. When did you get it opened?
- A. Some time during the latter part of January.
- Q. 1906?
- A. After we had that interview.
- Q. Was it spiked all that time?

A. It was so reported to me. I didn't see the spikes, but it was reported to me by our employees.

Q. Previous to that had there coal come off that siding and gone on to the Cush Creek Branch?

A. Not off that siding. Other coal had come off the Branch.

Q. Off the Horton Run Branch?

A. Yes sir.

Q. But not off your particular siding?

A. Not off this particular siding, no, sir.

Q. What coal did you have at your No. 5 in October, 1905?

A. You mean the area of unmined coal?

Q. Yes sir.

A. I would have to show that by another witness, Mr. Womelsdorf.

59 Q. How did you hold the coal there, as owners or lessees?

A. As lessees.

Q. How much was under lease?

A. The lease called for 260 some acres, but the tract contained about 300 acres.

Q. Who was your lessor?

A. J. O. Clark.

Q. You individually leased to the corporation?

A. Yes sir.

Q. What was the royalty

A. Ten cents.

Mr. GOWEN: I think you had better put the lease in. I object to what the lease contains, the lease itself being the best evidence.

By Mr. LIVERIGHT:

Q. What royalty did you pay at Falcon No. 2

Mr. GOWEN: I object to that on the ground the lease itself is the best evidence.

The COURT: That is a fact you can prove. Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

A. 15 cents a gross ton.

By Mr. LIVERIGHT:

Q. And what royalties at Nos. 3 and 4?

A. We paid different royalties at No. 3, varying from five to ten cents.

Q. What was the average royalty paid there?

A. I would say about seven and one-half cents.

Q. What royalties did you pay at No. 4?

A. Ten cents up to a certain minimum. When we exceeded that minimum the royalty was to be eight cents.

60 Q. Did you ever exceed the minimum in 1905 and 1906?

A. Not to my knowledge.

Q. Ten cents then was what you paid at No. 4 during the period of this action?

A. Ten cents.

Q. What mines were competitive with yours on the Cush Creek Branch?

A. The mines of the Glenwood Coal Company and the mines of the Urey Ridge Coal Company.

Q. Do you know who operated those mines?

A. It was commonly known that the owners were David E. Williams & Company of Philadelphia.

Q. How was their car supply compared to yours at No. 5?

A. They received the major portion of the cars on that Branch during this period.

Q. What were the conditions of car supply at No. 5?

A. The conditions were very poor.

Q. Give some of the details connected therewith.

A. We had an inadequate car supply. Some times we would go along for two or three days without receiving a car, then perhaps we would get a steel car or wooden car, and when they had an extraordinary good supply we might possibly get three or four cars at that mine. But Williams & Company received cars almost every day just as regular as clock work.

Q. Were they private cars received by Williams?

A. No sir, they were system cars.

Q. Did you have any private cars?

A. No sir.

Q. State with what degree of steadiness the Williams mines kept running.

A. They worked very regular.

Q. How about yourselves?

A. We worked very irregular.

61 Q. State whether or not there was any other reason contributing to this irregularity of work except the car supply?

A. None that I recollect.

Q. What was your capacity at No. 5?

A. Our capacity when we started was about 100 tons a day at 5 and 6. At the time the mines were examined by the Inspector of the Pennsylvania Railroad I believe they showed a maximum physical capacity of about 300 tons at the two mines.

Q. When was that?

A. That must have been sometime during the year 1906.

Q. Did your Company or your associates own the Horton Run Branch of railroad?

A. Myself and associates owned it; yes, sir.

Q. At the time of this action?

A. Yes sir.

Q. Did you also own the siding leading from that branch to your No. 5 mine?

A. Clark Brothers & Jacoby owned the siding. They paid for it.

Q. Now where was this spiking of which you have spoken?

A. I can't answer that, Mr. Liveright, I didn't see it.

Q. Do you know from knowledge you have gained whether it was at the point where Clark Brothers & Jacoby siding connected with

the Horton Run Branch or where the Horton Run Branch connected with the Cush Creek?

A. It was reported to me as being at this No. 5 tipple. That would be at the Horton Run Branch, both ends of it. The connection of the Horton Run Branch with the Cush Creek Branch was a quarter of a mile further down or more, down towards the main Cush Creek Branch.

62 Q. What did the Pennsylvania Railroad Company have to do with your siding connection with your own branch?

A. Nothing.

Q. Were you present at the interview with Mr. Atterbury?

A. Yes sir.

Q. State whether or not his attention was drawn to the fact that your siding connection with the Horton Run Branch was spiked?

A. I don't recollect that.

Q. Did you have interviews with any other officers in the executive capacities of the Pennsylvania Railroad with reference to car supply or rating matters during this period?

A. Not personal interviews, no sir, not that I remember.

Q. Your complaints were confined to the letters about which you have spoken?

A. Yes sir, it was all covered by correspondence.

Q. State whether or not in response to one of your letters you received a reply from Mr. Trump?

A. I did.

Q. I hand you Plaintiff's Exhibit No. 27, bearing date March 6th, 1907, and ask you whether it is the letter you received from Mr. Trump, to which you have already made reference.

A. Yes sir.

Plaintiff offers Exhibit No. 27. We will withdraw that offer for a moment.

Q. Mr. Clark, state whether or not on March 5, 1907, you wrote a letter to Mr. Trump, General Superintendent Transportation of Pennsylvania Railroad Company at Philadelphia?

A. I did.

63 Q. State whether or not a letter press copy of the same was made?

A. Yes sir.

Q. Did you sign the letter?

A. Yes sir.

Q. Does the copy thereof bear your signature?

A. Yes sir. (Marked Plaintiff's Exhibit No. 26½.)

Plaintiff offers Exhibit No. 26½, being the letter to which Exhibit No. 27 is the reply. In connection therewith Plaintiff renews the offer of Exhibit No. 27.

"March 5, 1907.

"Mr. M. Trump, General Superintendent Transportation P. R. R. Co., Philadelphia, Pa.

DEAR SIR: We beg to acknowledge receipt of your letter of the 25th ult. replying to ours of 19th relative to the rating of our

Falcon 2, 3 and 4 operations, located on the Tyrone Division of the P. R. R. We have not increased the physical development at the operation above named. Under your ruling and method of rating our mines and distributing cars to these mines, from past experience, we know it will be a physical impossibility to further increase the output capacity of these mines. Our mines are not fairly rated neither are we getting a fair share of the cars. We know of some shippers on your lines who are getting a supply of cars almost equal to their maximum output capacity. Whether these cars are individual cars, cars of special marks or cars furnished for fuel supply we do not know, but we do know that some other operators on your lines are working while our mines are idle and that you are furnishing motive power, railroad tracks and other facilities to assist such

64 operators in successfully operating their mines profitably, thereby enabling them to keep up a first class organization at all times at their mines and to supply their customers with coal in an entirely satisfactory manner. In this matter we feel like one of our customers, who recently came into our office in a rage, and wanted to know when he was going to get a car of coal from our Falcon No. 2 operation, which was one of a number of orders that had been on our books unfilled for several weeks. We tried to pacify him by explaining that we had been experiencing a severe car shortage but would ship the first car received at our Falcon No. 2 mine on his order, and he replied that he cared nothing at all about the car shortage, that he was not at all interested in our car supply and did not want to know anything about it, what he desired was the coal and if it was not shipped that day he would cancel his order and place it elsewhere. So it is with us, we are not interested in the railroad business or in individual car supply so far as the rating and supply of cars to our mines is concerned, and what we want to know at this time is, whether we can or cannot get such a rating and supply of cars as is equitable and just and such as we believe you, as common carriers, have a right to furnish. If you cannot do something promptly that will afford substantial relief in the way of better and regular supply of cars at these operations, as stated in our letter of February 19th, we will be obliged to apply to the Courts or adopt some other measure that we believe will be helpful in protecting us against further loss. If you have anything to suggest that will assist us in any way in bettering the conditions at the operations named, we will be glad to hear from you promptly.

Under your system of rating mines and supplying cars we do not see how it is possible for us to gain a foothold or do any better than we are doing at the present time. The operator who has been favored in the past is able to make shipments almost to the maximum output capacity of his operation while the operator who has not been so
65 favored has not the slightest chance to increase his development or output capacity, at least this has been our experience, after having made a determined effort to increase our developments and the physical capacity of our several operations at a large cash outlay.

Awaiting your reply, which we trust we may have at an early date, we beg to remain,

Yours truly,

J. O. CLARK, *President.*

(COPY OF PLAINTIFF'S EXHIBIT No. 27.)

"The Pennsylvania Railroad Company.
Philadelphia, Baltimore & Washington Railroad Company.
Northern Central Railway Company.
West Jersey & Seashore Railroad Company.
General Office, Broad Street Station.

PHILADELPHIA, March 6th, 1907.

Mr. Trump, General Superintendent Transportation.

Mr. J. O. Clark, Prest., Clark Coal Mining Co., Commonwealth Trust Building, Philad'a.

DEAR SIR: I have your favor of March 5th and in reply I will endeavor to give you some statistics which I think will convince you that our method of rating mines and method of car distribution are as fair and equitable as can be devised.

I am quite well aware that each operator on our lines feels that if he had a rating for his mines equal to his maximum ability to produce coal he would receive a better supply of cars. This would not be true, however, under any uniform method applied to all mines alike as I will endeavor to show you.

66 The total ratings of the bituminous mines of all our regions as revised and taking effect February 1st, 1907, are 7211 cars; the total ratings as ascertained by our inspector being 10684 cars, our adopted ratings being 67.5 per cent of the maximum.

The average daily shipments for twelve months ending December 31st, 1906, excluding four months of 1906 when our mines were affected by the strike and including the last four months of 1905 so as to give us twelve months not affected by strike conditions, were 3665 cars; in other words, our bituminous coal shipments were 34.3 per cent of our maximum ratings and 50.8 per cent of our adopted ratings.

Whether these shipments as a whole would have been greater with a greater car supply is problematical, and I might say quite doubtful, as we know that during the period given the market adjacent to our territory was fairly well supplied and during a portion of the year over-supplied.

We fully realize that from a mining standpoint a regular and uniform car supply is desirable and conducive to economical operation, etc., but we also fully realize that if we could command sufficient cars to regularly supply all of our 525 mines with cars equal to our adopted ratings or 7211 per day, it would not be more than a week or ten days before cars would be so tied up under load

that we would have to place embargoes and that the resultant empty car supply would be just what it is today; namely approximately the number of cars unloaded.

Now, taking all of our regions as 100 per cent and determining the percentage thereof of the maximum ratings and the percentage thereof of our adopted ratings, we find that these ratings do not vary more than a few tenths of one per cent. For instance, take the region in which your mines are located, namely, the Tyrone region; if all of our mines were rated on their maximum capacity the Tyrone region would represent 9.3 per cent. Based on
67 our adopted ratings, the method of computing which I have already explained to you, the per cent of the Tyrone region is 9.0 and as we have an elaborate method of prorating our cars between regions, the Tyrone region would get practically the same percentage of cars under either system of ratings.

The reason that the percentage of the Tyrone region as adopted by us falls $3/10$ of one per cent short of the maximum you can readily realize as you are quite well aware that a number of the mines in this region are not very active and have an apparently high physical capacity due to old workings, etc. The actual shipments from this region for the period given amounted to 7.4 per cent, and a combination of these with the maximum capacity gives us our adopted rating of 9.0 per cent. Now, as these ratings and percentages are made up of the individual mines contained in each region, you will readily see that with any consistent method of rating mines there would be no difference in the number of cars supplied.

As to our duties as common carriers, we realize fully what is expected of us and I think it is unnecessary for me here to give you the details of what the Pennsylvania Railroad Company has done in the past four or five years to furnish equipment. Prior to 1902 the Pennsylvania Railroad was an enforced car borrower to a considerable extent (1) by virtue of the rights of the individual car owner to run his cars on our road and (2) by the natural flow of foreign cars into our territory.

In July, 1902, in the midst of our congested condition due to the anthracite coal strike, the per diem method of settlement for cars was adopted in lieu of the mileage settlement and this, in addition to the desire of our management to fully take care of its shippers, induced the Company to build cars on a very large scale so that today the conditions are reversed and we are large car lenders, but enforced car lenders because we cannot get our cars back, except
68 in accordance with some natural law which seems to regulate the return of equipment and which as yet is not clearly defined; in other words, we have not yet found out how many cars a railroad should have in the general pool of the United States to produce a number of cars daily on its lines equal to the demands of its shippers, and until this is ascertained all railroads are liable at times to be short of equipment and of course at other times have equipment very much in excess of their needs.

Now, our average distribution is about as follows:

System cars for company coal.....	21	per cent.
Foreign cars for supply coal.....	6	" "
Individual cars.....	45	" "
System cars for commercial coal.....	25	" "
Foreign cars for commercial coal.....	3	" "

Now, I assume that you are familiar with our method of distribution which deducts from the mine capacities before a prorate is made all cars which may be assigned to mines, such as company coal cars and individual cars. This we consider proper and inasmuch as these assignments are necessary, the remainder constitutes the actual proratable capacity to which the general distribution of cars is applied.

After making these deductions from mine capacities, shippers who do not have the advantage of these cars are receiving a variable percentage of their ratings based on conditions. For instance, the percentage in September, 1906, was 67.9. In December, 1906, due to winter conditions, it was reduced to 52.8 per cent. In January, 1907, when labor conditions affected the loading somewhat in the earlier part of the month, we had at the mines of our bituminous shippers not having the advantage of individual cars or company coal orders cars available equal to 85.3 per cent of their rated capacity. In February, 1907, this percentage dropped to 42.6 due to weather conditions entirely and to the fact that coal at destination was so frozen as to make the rate of unloading very much below the average. Under such conditions as these the theoretical more obligations of common carriers must of course be entirely dependent upon their physical ability to accomplish what they desire.

I do not think any question can be raised in regard to our ability to handle our traffic with dispatch. All through the month of February we had ample power at our command, but it was a question entirely of getting our coal cars unloaded.

I am giving you this detailed information hoping that it may explain to you some facts not heretofore brought to your attention or to the attention of a considerable number of our bituminous coal operators who feel the same as you do with reference to our methods of rating and distribution.

We have given this whole question very careful study for some years past, and we do not feel that any method uniformly applied will give our operators any better results than the one we are now working under. The only thing that apparently will give better results is more cars, and this only for a comparatively short time for the reason that the empty car supply will finally be the number of cars released from load daily so that the whole question resolves itself into one of actual consumption.

Yours truly,

M. TRUMP,
Gen'l Supt. Trans."

By Mr. LIVERIGHT:

Q. Mr. Trump states, Mr. Clark, the statistics which I think will convince you that our method of rating mines and method of car

distribution are as fair and equitable as can be devised. Were you convinced?

A. No, sir, I was not.

Q. Did you get any better supply or any relief after that letter was received?

70 A. The rating of our mine was increased, but I couldn't see any change in the supply of cars.

Q. Notwithstanding the increased rating?

A. No, I don't think there was any attention paid to that system. They had a system of rating mines but it is my opinion they didn't pay any attention to that system in the distribution of cars. If they had, we couldn't have gone along for a week at a time without getting a single car.

Q. Is that opinion of yours confirmed by your observation?

A. It is confirmed by what actually happened at our mines.

Q. You say your rating was increased about this time?

A. Well I think it was after that.

Q. Shortly after?

A. After that or possibly before. We wrote similar letters protesting against the unfair distribution of cars to our mines.

Q. Now was there any physical reason after this letter of March, 1907, different from the physical conditions that obtained in 1905 and 1906 that resulted in this change of rating?

A. Not to my knowledge, no sir.

Q. In other words, were your mines as much entitled in the fall of 1905 and throughout 1906 to the increased rating as they were in March, 1907?

A. They were at Falcon No. 2.

Q. How was the bulk of your coal sold, at the mines?

A. Yes sir, f. o. b. cars at the mines.

Q. Do you know whether the coal from the Berwind mines takes the same freight rate as your coal at the Falcon mines?

A. It is in the Clearfield district and must take the same rate.

71 Q. Does the coal at the Williams mines take the same freight rate as your coal at Falcon No. 5?

A. Yes sir.

Q. State whether or not there is any substantial or material difference in the circumstances and conditions obtaining at your mines and your competitors' mines, shipping conditions?

A. As to thickness of coal, etc.?

Q. Apart from car supply?

A. In the car supply?

Q. Apart from the car supply?

A. No, no material difference.

Q. State whether or not you and your competitors, apart from car supply, operate under substantially similar conditions and circumstances?

A. Yes, I would say so as a general proposition.

Cross-examination.

By Mr. GOWEN:

Q. Mr. Clark, I think I understood you to say that it was about Christmas or the latter part of December, 1905, that you asked Mr. Cleve for a rating for No. 5?

A. Yes sir.

Q. Then you say your interview with Mr. Atterbury followed about January 5th, about two weeks after?

A. Mr. Jacoby's statement shows January 6th.

Q. About two weeks later?

A. Yes sir.

Q. And the rating was given and the delivery of cars commenced in the latter part of January?

A. Yes sir, I suppose so.

Q. So that within a month after the application for a rating the mine had been examined by the defendant and a rating given and the delivery of cars commenced?

A. I don't think any examination had been made by the Pennsylvania Railroad Company.

72 Q. How was the rating arrived at?

A. I don't think any rating was assigned to it at that time.

Q. You don't know anything about that?

A. That is my opinion. We have a statement here showing the exact date.

Q. But the delivery of cars commenced then within a month after you applied for the rating?

A. Yes sir.

Q. Now you say you never saw the so-called spiking?

A. No sir.

Q. So you don't know really what it consisted of?

A. No sir.

Q. Your understanding is that it prevented the opening of the switches which connected the mine siding at No. 5 with the Horton Run Branch?

A. My understanding is that it was a vicious act.

Mr. GOWEN: Will your Honor strike that out and instruct the witness to answer the question?

Mr. COLE: Just answer the question.

The COURT: Let it be stricken out.

By Mr. GOWEN:

Q. Your understanding is that it prevented the opening of the switches which connected the mine siding at No. 5 with the Horton Run Branch?

A. Yes sir.

Q. The engines of the Pennsylvania Railroad Company and the crews of the Pennsylvania Railroad were operating over the Horton Run Branch, were they?

A. Yes sir.

Q. If those switches had been opened and been left in position

where they could be opened and had been opened, a wreck might have occurred?

A. I don't think so.

73 Q. All right, we will pass that if you don't think so.

Mr. LIVERIGHT: Go ahead with your explanation.

A. Because there was a lock lever on the switch at the point of switch, a lever that could be thrown over and locked, an arrangement there with a pad lock, and if I am not mistaken the conductor carried the key to those various pad locks, on the different sidings up and down the Horton Run Branch.

By Mr. GOWEN:

Q. If those switches had been opened and been left in position where they could be opened and had been opened, a wreck might have occurred?

A. A wreck might have occurred if the switches had been thrown open.

Q. What disadvantage was it to your Company during the time when the delivery of cars was not being made on those switches at No. 5 to have the switch locked and put out of service?

A. What disadvantage was it?

Q. Yes.

A. A very great disadvantage. It prevented us shipping coal and taking care of our market at a season——

Q. What disadvantage was it to your Company during the time when the delivery of cars was not being made on those switches at No. 5 to have the switch locked and put out of service?

A. It prevented us from operating the switch.

Q. What advantage would there have been in operating the switch when no cars were being delivered there?

A. None. No advantage when no cars were delivered.

Q. So the blocking or spiking what you call it of the switch did no harm whatever to your Company?

A. Not at all, if the Railroad didn't propose to furnish cars.

74 Q. And when the mine was ready and the cars were being delivered, the switch was put into service?

A. No sir, don't think the mine was ready when the switch was put into service. It was put into service after Judge Krebs had written Mr. Cleve.

Q. Then you got the advantage of having the switch put into service before the mine was ready, is that it?

A. That is it. That is my understanding of it.

Q. Now with reference to the ratings of your mines, you are aware, are you not, that the system of ratings prevailing during the period of the action took into account not merely the physical capacity of the mine to ship but also the actual volume of shipments that had been made by the various mines during the preceding period?

A. Yes sir, I am thoroughly familiar with that system.

Q. That was the system?

A. Yes sir.

Q. Do you not know that when you sent Mr. Womelsdorf's report to the defendant or communicated the contents of it that the defendant adopted Mr. Womelsdorf's estimate of capacity in arriving at the ratings?

A. Yes sir, Mr. Trump accepted his estimate of the maximum physical capacity.

Q. So your quarrel with the ratings is not because we failed to properly determine the capacity of your mines but because we didn't give the rating based upon the capacity but upon the capacity and the shipments and combining those two arrived at the rating. In other words, your quarrel is with the system and not with our estimate of the physical capacity of your mines?

A. Well we don't believe the system is the proper system to operate under in the rating of the mines. We didn't care whether there was a system or not if we received cars.

Q. I understand that, but you do not claim that in arriving
75 at ratings under the system which we had in force we failed to give your mines a proper physical capacity, that we failed to take into consideration a physical capacity of your mines which was too low?

A. No sir, I don't claim that.

Q. It is simply a question whether in combining that physical capacity with the shipments we adopted a proper method?

A. That is it precisely.

Q. Mr. Clark, you were asked on your examination in chief as to the extent to which you had sold your coal under contract. I wish you would let us have the aggregate amount of coal covered by contracts which were in force during this period?

A. We can give you that.

Q. And the prices at which they were sold?

Mr. LIVERIGHT: You don't need to give it now.

A. You want the contracts showing the aggregate tonnage?

By Mr. GOWEN:

Q. I would like to have the tonnage covered by each contract and the price at which that tonnage was sold?

A. Yes sir.

Q. You can also let us have, can you not, the actual price realized each month for the coal sold?

A. Yes sir, I think they have that.

Q. And shipped from the Falcon mines?

A. Yes sir.

Q. Now I wish you would give us also—well I don't suppose you can give it to us immediately—the dates when you say you received no cars for weeks?

A. We will show that by another witness.

Q. You don't know actually then of your own knowledge?

A. I know by seeing his reports.

Q. That is all you know about it?

A. Yes sir.

Q. You also testified in chief that your coal was largely sold f. o. b. the mines?

A. Yes sir.

Q. Did your Company sell directly or through sales agents?

A. We aimed to sell most of our coal directly.

Q. Directly?

A. Yes sir.

Q. Through your office in Philadelphia?

A. Through salesmen, through our Philadelphia office.

Q. That is salesmen in your employ exclusively?

A. Yes sir.

Q. Where coal was sold f. o. b. the mine it was shipped by the Clark Coal Mining Company?

A. Yes sir.

Q. Consigned?

A. Consigned by Clark Brothers.

Q. To the ultimate destination?

A. Yes sir.

Q. No matter where that was?

A. Yes sir.

* * * * *

By Mr. LIVERIGHT:

* * * * *

Q. What proportion of your shipments was made f. o. b. cars at mines in Clearfield County?

A. Practically all of it. I would say from 95 to 98 per cent of the total tonnage was sold f. o. b. cars at the mines.

* * * * *

77 By Mr. GOWEN:

Q. Mr. Clark, with respect to the question of ratings of your mines, is it not a fact that on October 20th, 1906, Mr. Womelsdorf, at your instance, made an examination of the mines in order to determine their physical capacity and made a report to you which showed a physical capacity for Falcon No. 2 mine of 600 tons, at No. 3 of 120 tons and No. 4 of 275 tons?

A. Yes sir, he made such a report.

Q. And that upon the receipt of that report you communicated Mr. Womelsdorf's figures to the Railroad Company and they were adopted by them for the purpose of establishing the ratings which were then established?

A. Yes sir; but Mr. Womelsdorf stated in this report that the rating capacity which he had assigned to these mines was conservatively made.

Q. That is, his estimate of their physical capacity was a conservative estimate?

A. Yes sir.

Q. But in May, 1907, when no change as you say had taken place in the mines which would have increased their capacity, the Railroad Company made an examination through its own inspector and in the

case of No. 2 advanced Mr. Womelsdorf's figures from 600 tons to 709 tons. Is that right?

A. They advanced the maximum physical capacity estimate.

Q. In other words, they gave you credit for a larger physical productive capacity than Mr. Womelsdorf gave you as to No. 2?

A. Yes sir.

Q. The same was true at No. 3?

A. Yes sir.

Q. And that at No. 4 they found the same capacity that Mr. Womelsdorf had, 275 tons?

A. Yes sir.

Q. Those were the facts?

A. I believe that was their statement.

* * * * *

78 J. O. CLARK recalled on part of plaintiff.

* * * * *

Cross-examination.

* * * * *

By Mr. GOWEN:

Q. When you were on the stand before I asked you as to the contracts which you had outstanding during the period of the action for the sale of coal?

A. Yes, sir.

Q. Will you look at those contracts and state whether they embrace the contracts in operation during the period?

A. Those contracts I handed you were in operation during that period.

Q. So we can just get them on the notes, I hand you contract between Clark Brothers & Jacoby Incorporated and the Robb, Mumford Boiler Company of Framingham, Massachusetts, dated October 1st, 1906. Is that one of the contracts which was in force and that calls for how much coal?

A. That calls for the estimated requirements of the Robb, Mumford Boiler Company, estimated at 750 tons from October 1st, 1906, to October 1st, 1907, Falcon No. 2 coal or Hillsdale No. 1, buyers' option.

Q. At the price and place of delivery?

A. At the price of \$4.10 per gross ton f. o. b. cars South Framingham, Massachusetts.

Q. Now I hand you contract between Clark Brothers & Jacoby Incorporated and the Ferricute Machine Company of Bridgeton, under date of February 10, 1906. Will you say whether that contract was one of those operative during the period of the action?

A. Yes, sir.

Q. What does that call for?

A. That calls for the buyers' total requirements from date first above written until 1st April, 1907, estimated at from 1,000 to 1,500 tons Falcon No. 2 coal, price of \$1.25 f. o. b. mines.

Q. I hand you a copy of a letter, not signed, addressed to T. E. Stern, President Scranton Coal Company, Wooster, Massachusetts, under date of August 5th, 1906. Did that cover coal sold under contract during the period of the action?

A. I think that had better be explained by Mr. Jacoby. He conducted that transaction.

Q. I hand you letter of the Novan & Wood Machine Company of Hoosic Falls, New York, addressed to Clark Brothers & Jacoby Incorporated, dated August 30th, 1906, and what purports to be a copy of reply to that letter, dated September 1st, 1906, and ask you whether that correspondence covered coal which was sold during the period of the action?

A. Yes, sir, it did and we came pretty nearly getting in serious trouble with those people through failure to make delivery. The price was \$3.75 per gross ton on East Bound siding at Hoosic Falls. We were unable to make delivery on that and they threatened to buy spot coal outside and charge us with the difference. I don't think we have ever sold that concern a pound of coal since.

Q. That is Hoosic Falls, New York?

A. Yes, sir.

Q. I hand you contract between Clark Brothers Coal Mining Company and Montello Brick Works, Reading, Pennsylvania, dated March 15th, 1907, and ask you whether that contract was in force for any period, and if so, what it covered?

A. That covered 6,000 gross tons of Falcon No. 2 coal, to be shipped in approximately equal monthly proportions from the 1st of April, 1907, to 1st of April, 1908, f. o. b. cars mines, shipments in their several plants, at a price to buyer of \$1.30 gross ton f. o. b. cars mines.

Q. Another contract, Clark Brothers Coal Mining Company and Baker Brothers, Allentown, Pennsylvania, dated February 22nd, 1907, and ask you what that contract covered and what was the price of the coal?

A. That covered 90 to 100 gross tons per month, to be shipped at the rate of one car every 10 days from now until

April 1st, 1908, of Falcon No. 2 coal, for shipment to Allentown, Pennsylvania, Lehigh Valley Railroad delivery, at price of \$1.30 per gross ton f. o. b. mines.

Q. Another contract between Clark Brothers Coal Mining Company and the Black Rock Knitting Company of Mechanicsville, Pennsylvania, dated April 1st, 1906?

A. That covered 200 tons as follows: as near as practicable: April 1st, 1906, 30 tons; June 1st, 1906, 30 tons; August 1st, 1906, 30 tons; October 1st, 1906, 30 tons; December 1st, 1906, 30 tons; January 1st, 1907, 30 tons; February 1st, 1907, 30 tons; March 1st, 1907, 30 tons; Falcon No. 2 bituminous coal, at the price of \$1.25 per gross ton f. o. b. mines. I think that is another concern we got into trouble with.

Q. Because of non-shipment?

A. Yes, sir, that is my recollection.

Q. Now there is a contract March 30th, 1905, between Jacoby &

CHART

TOO

LARGE

FOR

FILMING

0.1005

Company and E. L. Monn trading and doing business as E. L. Monn Coal Company?

A. I understand that contract covered a period of one year and after we acquired an interest in the Jacoby mines we of course fell heir to that contract.

Q. You assumed it?

A. But as to the price I would have to refer that to Mr. Jacoby, because I am not familiar with it. It was during a period of time before we acquired his operation.

Q. Was it in force during the period of the action?

A. I understand so. That was dated January 1st, 1905.

Q. Dated March 30th, 1905?

A. It would run until March 30th, 1906.

Q. You think it was only in force during that year?

A. I think so. I don't think it went beyond the year.

Q. You don't know what tonnage was shipped under this, do you?

A. I do not.

81 Q. Contract between Clark Brothers Coal Mining Company and Shields Sons, of Lansdale, Pennsylvania, dated March 29th, 1907. What tonnage does that cover?

A. That covers their total requirements of Falcon No. 2 coal from the 1st of April, 1907, to the 1st of April, 1908, estimated at 2 cars per month, f. o. b. cars at mines, for shipment to Lansdale, Pennsylvania.

Q. The price?

A. P. & R. Railroad, price of \$1.25 per gross ton f. o. b. cars at mines.

Q. And those you think were all the contracts in force?

A. Those are all the contracts I have been able to find covering these particular mining operations.

Q. You mean all the Falcon mines?

A. I mean all the Falcon mines, yes, sir.

Q. In your examination in chief you testified your estimate was that from 95 to 98 per cent of the coal which would have been shipped had you secured additional cars would have been sold f. o. b. the mines?

A. Yes, sir.

Q. But you were unable to designate how much of that coal would have been consigned or actually shipped to points outside the State?

A. I couldn't give you that. I couldn't give you any estimate of that.

Q. Did you not in the proceeding before the Interstate Commerce Commission prepare and file with the Commission a statement in which you distinguish as between the total loss which you claim you had sustained as the result of being unable to ship to points within the State and to points without the State respectively?

A. We prepared such a statement, yes, sir.

Q. Is that it?

A. I think that is it. (Statement marked Defendant's Exhibit No. 2.)

(Here follows Defendant's Exhibit No. 2, marked page 82.)

83

J. O. CLARK recalled on part of Plaintiff.

By Mr. COLE:

Q. Mr. Clark, have you had prepared a statement showing your estimated losses in this case?

A. What is the question?

Q. Have you had prepared a statement showing your estimated losses that you claim in this suit?

A. Yes sir.

Q. Now I show you a paper here marked Plaintiff's Exhibit No. 34. In this have you set out or had set out an estimate and the basis upon which that estimate is made?

A. Yes sir.

Q. Now, Mr. Clark, what price do you base your damages on, that is what selling price of coal for Falcon No. 27?

A. \$1.25 per gross ton.

Q. Now why have you accepted that figure and carried it throughout the period of the action?

A. That figure was accepted as a conservative value for Falcon No. 2 coal during this period.

Q. Now, how many tons per month have you claimed the right to mine?

84 A. 12,000 tons.

Q. How many working days did you base that on?

A. 20 days.

Q. Was there actually more than 20 working days in some of the months?

A. Yes sir.

Q. Was there any months in which there was not more than 20?

A. No sir.

Q. Now why did you accept 20 days?

A. We made allowance for break-downs, holidays and other accidents in order to make our statement very conservative.

Q. Now, Mr. Clark, based on these facts that you have stated and the other elements that are in the case, what do you claim your damages are to Falcon No. 2?

A. \$45,509.59.

Q. Now did you make up the No. 3 in the same way?

A. Yes sir, we had it made up in the same way.

Q. What price do you fix there for the selling price of coal?

A. \$1.20 per gross ton.

Q. That continues throughout the whole period, does it?

A. Yes sir.

Q. Why did you take that price?

A. We considered that that was a very fair value for that coal during the period.

Q. Was it justified by the figures that you received for that coal you did sell?

A. I believe so, yes sir, from the table I have seen.

Q. Was you asked to state before, I am not sure, as to the effect

upon the price that you could get for coal to have been able to guarantee a prompt or regular delivery?

85 A. Our inability to guarantee a prompt and regular delivery prevented us oftentimes from getting the cream of the business, the better business.

Q. And the best price?

A. At the best prices.

Q. Now what is your damages that you claim for that mine?

A. \$5310.38.

Q. In the same way as to No. 4 what damages do you claim?

A. We claim \$13,565.51.

Q. Now state whether or not you claim in this case for damages on coal that was mined, for excess cost of mining, by reason of your limited output?

A. Yes sir, we do.

Q. I show you a paper marked Exhibit No. 35. What is that paper?

A. That is a paper showing the loss on shipments actually made, due to excessive cost of production on account of an inadequate and irregular car supply at Falcon No. 2, 3, 4, 5 and 6 mines.

Q. What is that damage you claim at Falcon No. 2?

A. In the lump sum?

Q. Yes?

A. \$9041.38.

Q. And in No. 3?

A. \$1034.47.

Q. No. 4?

A. \$732.58.

Q. And No. 5 and 6?

A. \$3070.59.

Q. What is the total amount of damages that you claim on that item?

A. \$13,879.02.

86 Q. Did you also have an estimate made up of your loss on coal that you claimed the right to ship from 5 and 6?

A. Yes sir.

Q. I show you Exhibit No. 36. What is that statement?

A. That is a statement showing our claim for loss at Falcon No. 5 and 6 for the tonnage that we were prevented from shipping, due to an irregular and inadequate car supply.

Q. What price have you put upon the coal from those two mines?

A. \$1.15 per gross ton.

Q. Does that continue throughout the whole period of the action?

A. It does.

Q. Why did you adopt that price?

A. We adopted that price because we considered it a fair value for the coal.

Q. It is justified by the prices you actually received for coal of that character?

A. I believe so.

Q. What are your damages claimed from those two mines?

A. \$11,527.82.

Q. State, Mr. Clark, if you make claim in this case for damages in the delay in settling this claim of yours?

A. No sir, we haven't made any such claim.

Q. You haven't yet. Do you claim you have a right to recover in this case from the Railroad Company damages for delay in payment of your claim?

A. We haven't made any such claim.

Q. I know, to the Railroad Company, but do you claim it here?

A. On account of delay?

87 Q. Yes?

A. No sir.

Q. Delay in paying it?

A. No, we haven't made any such claim.

Q. State whether or not you claim more than just the single damages here?

A. Yes sir, we claim treble damages.

Cross-examination.

By Mr. GOWEN:

Q. Can you tell me why that price, the price of your coal at No. 3 was uniformly \$1.20 throughout the period of the action, the price realized, while the prices for the coal at the other mines varied?

A. The Falcon No. 3 coal was not as good, the quality was not as good as No. 2.

Q. Why uniformly, month in and month out, you realized exactly \$1.20 for the coal that you sold?

A. I understand from our sales that that was the average price received for the coal during this period, for the Falcon No. 3, approximately. I don't know that it is exactly.

Q. You were selling that coal, were you, to all purchasers generally and not under one contract?

A. No sir, not to any one consumer.

* * * * *

88 JOSEPH H. DORN called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

Q. Where do you live?

A. Buffalo, New York.

Q. What is your business?

A. I am the new York State manager for the Title Guarantee and Surety Company.

Q. Was you ever in the coal business?

A. Yes sir.

Q. When?

A. From August, 1906, to January, 1908.

Q. Did you sell the coal for Clark Brothers Coal Mining Company?

A. Yes.

Q. When did you begin to sell that?

A. August, 1906.

Q. How did that coal rank in the market as being a merchantable coal compared with other soft coal?

A. I sold the coal from No. 2 and that ranked with the best old Moshannon coal from that field.

Q. Was that or not considered a high grade of bituminous coal?

A. Yes, that was considered the very best of the old Moshannon vein.

Q. What difficulty, if any, did you have in securing deliveries of that coal?

A. Well that was the entire difficulty in the sales end of it, the matter of getting deliveries after the coal was sold.

Q. Well what difficulty did you experience in that, if any?

A. Well about half of our energy was devoted to getting the coal shipped after we sold it and that had the effect of practically barring us out from the big trade.

Q. State what kind of trade you undertook to furnish?

A. Well after I had been there a short time I tried to specialize on the big consumers, because we had three big mines there, good sized ones, and I wanted to place a large part of that output with the big purchasers.

89 Q. Was you able to do that?

A. Well I found after spending quite a large part of the time in working up that particular line of trade that the question of being able to supply it regularly came up and very often after having shipped sample cars and arranging the price, we were practically barred out by reason of not being able to guarantee the delivery of it.

Q. State what quantity of that coal you were able to dispose of, if it could have been delivered?

A. Well I had tentative contracts that I could have closed amounted to something over 600,000 tons. I have a list of the people, there were about a dozen of them.

Q. Give us some of those names?

A. This is the list of concerns whom I had shipped samples to and the samples had proved satisfactory and in most cases the price had been practically arranged and arrived at, and then the question of our guaranteeing shipments came up and we simply had to withdraw because we didn't feel justified.

Q. Give us some of those names?

A. The Cumberland Glass Company, at Bridgeton, New Jersey, has a 50,000 ton contract. The Millville Bottle Company, at Millville, New Jersey, about 30,000 tons. N. Z. Graves & Company, at Camden, New Jersey, about 40,000 tons.

Q. You say the total aggregated between 5 and 600,000 tons?

A. I think it is between 6 and 700,000.

Q. Did you actually sell some of this coal?

A. I sold to all these people.

Q. I mean outside of these people you done some business for the Company?

A. Yes, I sold I should judge about 150,000 tons.

Q. What prices did you get, starting in now when you first went there down until you left them how did the prices average?

90 A. Well we got on No. 2 an average from \$1.25 to \$1.50, I should say about \$1.35 for an average price. No. 4 we averaged about \$1.25, and the others averaged about \$1.15 for the average steam coal.

Q. Now beginning in August, 1906 and running up until May, 1907, you say those were about the average prices?

A. Yes.

Q. You went there in August and this action closes in May, so that is all the time you covered?

A. Yes sir.

Q. State if you had difficulty not only in delivering your contracts but in getting delivery of sample coal, if you sold a sample car?

A. I had about 6 or 8 people there that I had arranged for the contracts and the prices was established, and we had to withdraw because we couldn't get the sample cars in. My recollection was we didn't get them shipped for 4, 5 or 6 weeks and they were only 2 or 3 car samples.

Q. In the sale of soft coal generally what is the nature of deliveries required, whether it is constant or whether you can sell a large bulk to be delivered at one time or delivered as it suited you; what is the general exaction of the trade?

A. My experience was they require approximately regular monthly shipments. They don't aim to accumulate any considerable quantity and the shipments have got to run in approximate equal monthly shipments.

Q. Do you recollect the firm of Graves & Company?

A. Their requirements were a regular shipment on alternate days. The conditions in their plant were such they had to have some tiem to handle it and they wanted a guaranteed number of cars every other day.

Q. Could you take that order at all then?

A. No, I simply threw that up.

Q. For what reason?

91 A. Because I couldn't say that we could control that factor of shipment.

Q. Where were these sales, these prices that you fixed, where were the sales made, f. o. b. the mines?

A. F. o. b. the mines, yes sir.

Cross-examination.

By Mr. GOWEN:

Q. You were reading the list of the purchasers to which you sold coal. Will you repeat that list and give me the names and locations?

A. Yes sir.

Mr. COLE: This is objected to as not cross-examination.

The COURT: I think it is competent.

A. The Susquehanna Iron Company, at Columbia, Pennsylvania.

That was about 25,000 tons. Worth Brothers, Coatesville, Penna. 100,000 tons. W. A. Clark Coal Company, Northampton, Massachusetts 50,000 tons. The American Can Company, various plants, 25,000 tons. The Lukens Iron & Steel Company, Coatesville, Penna. 100,000 tons. The Maryland Coal & Coke Company, of Baltimore, 100,000 tons. That is the approximate yearly requirements.

Q. Now weren't you negotiating with the Atlas Coal & Coke Company, Baltimore, Maryland?

A. Yes sir.

Q. What was that tonnage?

A. They did a commercial business, Mr. Gowen, and my recollection of our negotiations were I think they wanted about 25,000 tons for some Government business, and Mr. Williams came up to see me on it and after going over the thing several times I finally refused that. They had the contract for the Navy for the supply of the Navy around the world.

92 Q. Were your negotiations for yearly contracts for all these people?

A. Yes.

Q. What period did these yearly contracts usually cover?

A. The regular coal year from April to April.

Q. So that your negotiations then with these people was for coal to be shipped in the year beginning April 1st, 1907; you went in August, 1906?

A. Yes. Some of those contracts, as I remember, didn't run for the coal year either. Some of them were arranged between.

Q. The bulk of these were for the coal year I assume?

A. Yes, I should say so.

Q. Now you were examined as a witness, weren't you, in the proceedings brought by the plaintiff in this action against the defendant before the Interstate Commerce Commission?

A. Yes.

Q. I will read to you from the report of your testimony in that case and ask you whether that is a correct statement of the situation. Judge KREBS: During that period of time did you place a large amount of coal in addition to which you did actually sell, and why did you not take the contracts, if there was any reason? Mr. DORN: Well the conditions were such on account of the supply of cars which we had we did not feel justified in taking on a number of other large contracts, for the reason we did not think we could take care of them. Judge KREBS: What is the difficulty of selling coal through New England and other points where the contracts are to run for a year with respect to the ability of Clark Brothers to deliver the coal, what questions are raised and why? Mr. DORN: Well my experience among the larger consumers was that their sentiments were such that their experience had been unsatisfactory as to deliveries by shippers which did not have private cars, and if conditions arose by which the shipper did not have private cars he was in many cases eliminated from competition. Judge KREBS: State whether or not in discussing with consumers of coal the question of selling your coal they raised the question I asked,

the question whether these people had individual cars? Mr. DORN: Yes, that was almost invariably the case where the amount of tonnage was very large. Judge KREBS: When you informed them as to the facts on that matter what was the effect of it upon your getting contracts? Mr. DORN: Well the general condition I met with was they said their experience was not satisfactory as to deliveries by shippers not having private cars and they therefore did not care to make a contract on that basis. That was your statement?

Mr. COLE: We object to that as immaterial whether he so stated or not, it don't contradict anything he said here.

The COURT: I think it is competent. Objection overruled, evidence admitted, exception noted for plaintiff and bill sealed.

A. I presume the statement is correct, because you are reading from the record.

By Mr. GOWEN:

Q. And whether that correctly stated the conditions you met with in trying to dispose of this coal?

A. Yes.

Q. You wrote that letter to Clark Brothers Coal Mining Company, did you not?

A. That is my signature, Mr. Gowen, yes.

Q. In the letter which you have just identified as yours and which is dated June 9th, 1908, and addressed to Clark Brothers Coal Mining Company, after giving a statement of the contracts which you state you had endeavored to secure, you add this—

94 Mr. COLE: We object to that way of introducing it. If they want to offer that letter, let them offer it and the letter shows. (Letter marked Defendant's Exhibit "A.")

Mr. GOWEN: I will reserve the letter then until later.

* * * * *

95 E. C. HOWE called on part of plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. What is your business?

A. Well since 1891 I have been a mine foreman the principal part of the time.

Q. Have you been in the employ of Clark Brothers & Jacoby?

A. Yes sir.

Q. And Clark Brothers Coal Mining Company?

A. Yes sir.

Q. At which of their mines were you engaged?

A. All of their mines that they had at that time.

Q. Were you ever connected with Falcons 5 and 6?

A. Yes sir.

Q. What is your first knowledge of your connection with the No. 5 mine?

A. You mean when I went there?

Q. Yes?

A. I went there between Christmas and the first of the year of 1906, I don't just recollect the date.

Q. 1905, wasn't it?

A. Yes sir.

Q. What did you find at that time in the way of local conditions; was the mine operating?

A. No, the mine was standing still.

Q. Was there any coal out?

A. Oh my, yes.

Q. Where was it?

A. Piled outside.

Q. How many tons were stocked?

A. Well I could hardly estimate it, but I think about 1,000 or 1,500 ton. I know the last shipment we made from there during the strike of that stock coal we shipped between 6 and 700 ton.

96 Q. Now what conditions prevented the shipment of coal when you went there?

A. Well they couldn't get any cars.

Q. Was there anything in relation to the switch that prevented the cars being put in?

A. The switch was nailed shut, spiked shut.

Q. How was that done?

A. I didn't see it done. I suppose the railroad men done it.

Q. How did it appear on the ground?

A. You couldn't use the switch without unspiking it.

Q. Did you have any authority to unspike it?

A. No sir.

Q. How long after you went there did it stay spiked?

A. I think we got two cars shipped in the month of January.

Q. Was there any other reason than that and the car supply why you couldn't ship cars in January?

A. No sir, we had plenty of coal and plenty of men, that is, the men were ready to go to work and plenty of places for them.

Q. Was your salary going on all this time?

A. Yes sir.

Q. Were there any other laborers or day men employed whose salaries continued?

A. There was comparatively an open winter that winter, but there was a good many snow storms and after all those storms I had to get that road ready and it was very expensive. There was a plane of about 450 feet. There was a tramroad of 1,200 feet and side track below and tipple. Those had to be cleaned. I got them ready time after time at a cost of I can't tell you exactly the cost and we wouldn't work and that went on, I don't recollect when we got the first cars but I think it was after the middle of the month.

After the 15th.

97 Q. If you had received a regular car supply during that month would it have been necessary to go to all of this expense or not?

A. Well if we had went to the expense, we would have worked and got some of the money back. It cost about \$13 a day the fixed expenses on that mine, and if you would put a couple of men to work you would find the expense would run about \$13 a day.

Q. Whether you worked or not?

A. Whether you worked or not. \$8 and something was all the time. Then if we had some extra work to do, which some times we would have 5 or 10 men on for a couple of hours cleaning up these roads, it generally run up to about \$13, between \$13 and \$14 a day.

Q. You mean at all times, work or no work, there was an expense of \$8 a day?

A. \$8 and some cents, yes sir.

Q. At other times there were extraordinary expenses of \$5 a day?

A. Yes sir, \$4.80, along there somewhere.

Q. Were the latter items dependent on car supply at all?

A. Well it would have had to be done if we got cars and we did it when we didn't get cars, to be ready to work if we did get them. It would take 3 or 4 hours to clean the roads up and some times 6 hours.

Q. You mean the \$8 and some odd cents were fixed and constant expense?

A. Every day.

Q. Before you take up those papers, how were you equipped at

Q. No, what date is your report?

A. We had everything complete.

Q. Was it an up-to-date plant?

A. I would consider it so, yes sir.

Q. When was it built?

98 A. They had just finished it up when I got there. Must have been finished up in December.

Q. Just a new operation?

A. New operation, yes sir.

Q. What was your capacity at that mine?

A. Well when we first started why our day's work would show a capacity of about 100 ton a day.

Q. That was at the outset you mean?

A. Yes sir.

Q. Now did you later make a report on the subject in connection with the rating to be obtained?

A. Yes, the raters were there I think once or twice while I was there.

Q. Under what date is it?

A. The date they was there?

Q. No, what date is your report?

A. When we first started I think we put in 26 men and I reported then I have an output of 100 tons a day. When the rater came—Am I answering you right?

Q. Yes?

A. I showed him. I took him through the mine and showed him where I could turn just as many rooms off to the left in that mine as

I had turned on the right on the lefthand work and just as many on the right as I had on the lefthand work. If we wanted to increase the capacity, all they wanted to do was lay a little work and turn these rooms. I talked to Mr. Clark about it and he said the men wasn't making a living that was there and he didn't care about putting in any more.

Q. Never mind going into your conversation with Mr. Clark?

A. I was going to tell you why we didn't do it.

Q. This time when you made this report in July, 1906, what was your haulage capacity?

A. Well we wasn't doing anything, we was on strike.

Q. What was the capacity of your system?

99 A. It would have been—I suppose we could put out 150, perhaps 200 tons a day.

Q. What was your tippie capacity?

A. I don't consider there was any limit to that.

Q. How many steel cars could you have loaded?

A. I worked on the same kind of tippie where we dumped 1,600 ton a day.

Q. Now it is a number of years since you made that report and I wish you would read it and familiarize yourself with it please. In July, 1906, what was the estimated daily capacity, tonnage capacity, of your No. 5 and 6 mine?

A. Do you want my report of it here?

Q. I don't know that I want your report, I want your testimony what the tonnage capacity was?

A. On this date, July 9th, 1906, the man that the Pennsylvania Railroad Company sent there to rate the mine, we agreed on a capacity of 200 tons for Falcon No. 5. Now do you want No. 6? And on the same date we agreed on an output from No. 6 of 100 ton a day. Making the capacity of the two mines 300 ton.

100 *Defendant's Offer of Exhibit "A."*

SATURDAY, November 23rd, 1912.

Court convened at 9 A. M.

Mr. BIKLE: I offer in evidence the Charter of the Pennsylvania Railroad Company, the Act of the Legislature of the 13th day of April, 1846, found in the regular published pamphlet laws at page 312.

Mr. LIVERIGHT: For what purpose?

Mr. BIKLE: For the purpose of proving that we are a common carrier and the obligations that have been imposed upon us by the Commonwealth of Pennsylvania.

Mr. GOWEN: I want to offer in evidence this letter identified by Mr. Dorn. (Defendant's Exhibit "A.")

Mr. COLE: For what purpose?

Mr. GOWEN: For the purpose of showing the state of negotiations with the firms and companies named therein with respect to the coal of the plaintiff.

101 Mr. COLE: They could only offer it as part of the cross-examination and then for the purpose of contradiction, and it don't contradict the witness. We say it is not proper as a part of the cross-examination and it is immaterial and irrelevant.

The COURT: I think it is competent. Objections overruled, evidence admitted, exception noted and bill sealed for plaintiff.

(Copy of Defendant's Exhibit "A.")

"PHILADELPHIA, PA., June 9, 1908.

Clark Brothers Coal Mining Co., 1014 Commonwealth Trust Bldg., Philadelphia, Pa.

GENTLEMEN: Complying with your request of even date, I herewith hand you a list of consumers, together with their approximate yearly requirements:

Cumberland Glass Co., Bridgeton, N. J.....	100,000	tons
Millville Bottle Works " " "	25,000	"
N. Z. Graves & Co., Philadelphia, Pa., and Camden, N. J.	40,000	"
Susquehanna Iron Co., Columbia, Pa.....	25,000	"
Worth Bros., Coatesville, Pa.....	100,000	"
Vermont Marble Co., Proctor, Vt.....	15,000	"
W. A. Clark Coal Co., Northampton, Mass.....	50,000	"
Bangor Consol. Slate Co., East Bangor.....	2,500	"
North Bangor Slate Co., Upper Bangor.....	2,000	"
New York Quarries, North Bangor.....	2,000	"
Peoples Consol. Service Corp. Easton, Pa.....	2,000	"
Lukes Iron & Steel Co., Coatesville, Pa.....	100,000	"
Maryland Coal & Coke Co., Baltimore Md....	50,000	"
102 Atlas Coal & Coke Co., Baltimore, Md.....	40,000	"
Wm. Lindsay, Texas, Md.....	8,000	"
W. C. Dittman, Texas, Md.....	10,000	"
Sherwood Distillery, Cokeyville, Md.....	7,000	"
Glasgow Iron Co., Pottstown, Pa.....	50,000	"
McClintick & Marshall, Pottstown, Pa.....	50,000	"
Lessig Iron & Steel Co., Pottstown, Pa.....	50,000	"
W. A. Harris & Co., New York, N. Y.....	10,000	"
N. Y., N. H. & H. R. R.....	100,000	"
Harrisburg Pipe & Pipe Bdg. Co.....	40,000	"

I had the opportunity of competing for this business, as our price and quality were satisfactory, but did not feel justified in attempting to close up these contracts after taking into consideration our past experience with reference to supply of cars, as we could not guarantee deliveries; and after spending considerable time and money in soliciting this trade I finally withdrew.

This list comprises the largest consumers. There are, however, a number of smaller ones whom I cannot recall at this time.

Yours verly truly,

J. H. DORN."

103

Defense.

M. TRUMP called on part of Defendant, being duly sworn and examined, testified as follows:

By Mr. GOWEN:

Q. In the period of the present action you were General Superintendent of Transportation of the Pennsylvania Railroad, were you not?

A. Yes sir.

Q. And as such had general supervision of car distribution among the bituminous coal operators?

A. On the railroad generally.

Q. On the railroad generally, yes?

A. Yes sir.

Q. And during the period of the action, Mr. Trump, did the defendant's lines, or did the lines of the railroad operated by the defendant extend without the State of Pennsylvania and into other States?

A. Yes sir.

Q. And it was engaged in operating those lines and consequently was doing an interstate transportation business?

A. Yes sir.

Q. And that is true not only as to its general business but as well to its bituminous coal business which it transported?

A. Yes sir.

Q. That was transported to points both within and without the State of Pennsylvania?

A. Yes sir.

Q. From mines located in Pennsylvania?

A. Yes sir.

Q. In making distribution of its coal car equipment among its shippers did it make one distribution—

104 Mr. LIVERIGHT: We object to the form of the question.

By Mr. GOWEN:

Q. Having regard to the Interstate and State business which it was doing in the matter of transportation of coal, was there or was there not a separate distribution of its cars made for those two purposes?

A. There was not.

Q. How was the distribution made?

A. Without reference to the destination of shipments.

Q. Well in making distribution you say without reference to the destination of the shipments was any restriction put upon the shipper as to the points to which he should consign the cars which were delivered at his mine?

A. No sir.

Q. Was he or was he not at liberty to consign them as he liked, either to points without or to points within the State?

A. As far as P. R. R. cars are concerned.

Q. And how as to individual cars?

A. He did what he pleased with his own cars.

Q. As to point of destination to which they were to be shipped?

A. Yes sir.

Q. I understand no restriction was put upon the use of the cars so far as Pennsylvania Railroad cars and individual cars were concerned. What cars was he restricted?

A. The general understanding that foreign cars should be loaded to the road owning them, if he had any.

Q. Had you throughout the period of the present action any system or method in force covering the distribution of coal cars any time as among the shippers on the road?

105 A. We put a new system in effect on part of the road, including the Tyrone Division, in January, 1906.

Q. Have you a copy of the order or new rule which defined the distribution, the character of the distribution to be made?

A. Yes sir.

Q. So as to get it on the notes, will you just read it?

A. Pennsylvania Railroad Company. Philadelphia, Baltimore & Washington railroad. Northern Central Railway. West Jersey & Seashore Railroad. Office of General Superintendent of Transportation, Philadelphia, January 1st, 1906. General notice to shippers of bituminous coal. In accordance with a circular letter issued to shippers of bituminous coal in June last, the rating of bituminous coal mines located in the following regions have been carefully revised and the new ratings have been put in effect. Tyrone, Pennsylvania & Northwestern, Cambria & Clearfield, Pittsburg Division East End and South Fork & Scalp Level. Revised rating for bituminous coal mines in the following regions will be put in effect at an early date: Pittsburg Division West End. West Penn. River & Low Grade Divisions. A. V. Railway. Commencing January 1st, 1906, assigned cars, that is, cars for Pennsylvania Railroad fuel supply, foreign railroad cars specially consigned for the fuel supply of railroads sending such cars, and individual cars assigned by the owners to specified mines for loading, will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all other cars will be prorated. M. Trump, General Superintendent Transportation. Approved, W. W. Atterbury, General Manager.

Q. That rule became effective, you say, on January 1st, 1906, on both the Tyrone and Cambria & Clearfield Divisions of the railroad?

106 A. Yes, sir.

Q. Now during the preceding three months, that is, the months of October, November and December, 1905, what method of distribution was in force?

A. The method in force was in accordance with the general notice issued March 28th, 1905.

Q. Will you just read that so we may get it on the notes?

A. Shall I omit the heading?

Q. Omit the heading?

A. General notice to shippers of bituminous coal. Taking effect April 1st, 1905, the following rules will govern the distribution of cars to coal mines located on the Pennsylvania lines east of Pittsburgh and Erie. All railroad cars regardless of ownership, except as specified in the next paragraph hereof, and also all private cars not owned by the party loading them, will be considered as cars for distribution to mines in the several districts. 2. Cars placed by the Pennsylvania Railroad Company for its coal supply and empty cars of other railroad companies for their coal supply delivered to the Pennsylvania Railroad Company and specially consigned under specific arrangements between the companies, will not be subject to distribution and allotment, but must be used exclusively for the special purpose designated. M. Trump, General Superintendent Transportation. Approved, W. W. Atterbury, General Manager.

Q. Was it not a fact that during the period of the present action, that is, from October 15, 1905, to April 31st, 1907, the Railroad Company was making a percentage distribution of its cars to its shippers on its lines?

A. Yes, sir.

107 M. TRUMP recalled on part of defendant.

By Mr. GOWEN:

Q. When you were on the stand this morning we neglected to ask you what method was pursued in determining the ratings of the mines during this period, during the period of the action?

Mr. COLE: That is objected to under the testimony of both the plaintiff and defendant there was no occasion to rate the mine, both Mr. Creighton and our witnesses testifying they were ordinary times and the rating of the mine has nothing to do with it in such times. For the further reason the defendant has not shown they distributed the cars or attempted to distribute them under any rule or system of rating or anything else that amounted to an established system. This witness himself has admitted that they didn't observe the rule and they can't hide behind a rule they admit themselves they didn't observe.

The COURT: I think the testimony is competent under the discrimination charge.

Objection overruled, evidence admitted, exception noted and bill sealed for plaintiff.

A. Commencing January 1st, 1906, the method adopted was to combine the maximum physical capacity of the mines with the tonnage shipped for a given period, commencing with six months or three months I think the first ratings were and eventually getting up to a 12 months' period of tonnage. The maximum physical capacity being determined by the inspectors and the tonnage furnished by the auditor of coal freight receipts taken from his billings. The two factors were added together and the mesne was the tonnage

which we adopted as the rated capacity of a mine, converting that into cars of 35 tons.

108 By Mr. GOWEN:

Q. That is, you took the maximum physical capacity of the mine to produce coal up to its limit?

A. Yes, sir.

Q. And combined that with the shipments which had been made from the mines?

A. Yes, sir.

Q. Added the two together and divided by two?

A. Yes, sir.

Q. And the result was adopted as the rating for the mine?

A. Yes, sir.

Q. Previous to January 1st, 1906, the ratings had been made by whom?

A. The superintendent.

Q. The superintendents of each division?

A. Superintendent of divisions.

Q. And on January 1st, 1906, the ratings came under your supervision and this new system was adopted, is that it?

A. Yes. I think, however, those ratings were put in effect on the Tyrone division here about November 15th.

Q. 1905?

A. 1905, the ratings. That is the first division we worked up. It took us 7 or 8 months to get over the territory.

Q. As a result of the examination of mines on the lines of the Pennsylvania Railroad Company, which was made by the inspectors who were appointed to examine them for the purpose of determining their maximum capacity, what was found to be the total maximum capacity of the mines in all regions?

Mr. COLE: This is objected to as irrelevant, immaterial and incompetent.

109 The COURT: Objection overruled, evidence admitted, exception noted for plaintiff and bill sealed.

A. I think you have the statement, Mr. Gowen, I prepared on that. May 1st, 1906, 9,760 cars of 35 net tons capacity.

By Mr. GOWEN:

Q. That 9,760 cars represented the daily physical maximum capacity of the mines?

A. Yes, sir.

Q. On the lines of the Pennsylvania Railroad?

A. Yes, sir.

By the COURT:

Q. That is all of the regions?

A. All regions, yes, sir.

By Mr. GOWEN:

Q. How did that compare with the shipments which had been made in the period preceding the examination, the three months' period preceding the examination?

A. The average daily shipments for one year prior to that date was 3,317 cars or 34 per cent.

Q. So that the productive capacity of the mines was almost three times greater than the volume of shipments which had been made by all of the operators?

A. Yes, sir. At another rating period, May 1st, 1907, the capacity of the regions was 10,942 cars of 35 net tons, the average daily shipments for one year prior thereto 3,731 cars or 34 1/10 per cent.

Q. That was the conditions that existed at the end of the period of the present action?

A. Yes, May, 1907.

110 Q. Mr. Trump, prior to the anthracite coal strike in 1902 had there been any material shortage of equipment on the lines of the Pennsylvania Railroad Company?

A. No, sir, no serious complaints that I know of.

Q. Now taking the year 1900 then as a basis, I wish you would state to what extent the equipment of the Company was increased during the succeeding years, the equipment available for coal shipments was increased during the succeeding years down to the year 1907?

Mr. COLE: This is objected to. All of this testimony concerning the railroad conditions and car conditions prior to the beginning of this action is objected to as irrelevant, immaterial and incompetent.

The COURT: Objection overruled, evidence admitted, exception noted and bill sealed for plaintiff.

A. December 31st, 1900, total number of hopper cars owned was 32,550, with a tonnage capacity of 968,255 tons. Do you want me to give that year by year?

By Mr. GOWEN:

Q. I think you had better, yes?

A. December 31st, 1901, 35,141 cars, an increase in the tonnage capacity over 1900 of 167,075 tons or 17 3/10 per cent. December 31st, 1902, 36,167 cars, an increase in tonnage capacity over 1900 of 294,968 tons or 30 5/10 per cent. December 31st, 1903, 38,822 cars, an increase in tonnage capacity over 1900 of 554,130 tons or 57 2/10 per cent. December 31st, 1904, 36,475 cars, an increase in tonnage capacity of 445,702 tons or 46 per cent.

Q. Over 1900?

A. Over 1900. December 31st, 1905, 36,365 cars, an increase in tonnage capacity of 420,203 tons or 43 4/10 per cent. December 31st, 1906, 33,056 cars, an increase in tonnage capacity of 111 353,250 tons or 36 5/10 per cent. December 31st, 1907, 37,707 cars, an increase in tonnage capacity of 624,995 tons or 64 5/- per cent.

Q. How many tons increase?

A. 924,995 or 64 3/10 per cent. Now during that period there was a change in our equipment. Some of our small hopper cars were built as high side gondola cars, especially for the New England coal trade, cars of 100,000 pounds capacity. So that the gondola equipment also available for coal was increased as follows: December 21st, 1900, 28,396 cars, tonnage increase 824,355. December 31st, 1901, 28,765 cars, increased tonnage capacity 26,355 or 4 6/10 per cent. December 31st, 1902, 35,101 cars, increased tonnage capacity over 1900 392,908 tons or 47 7/10 per cent. December 31st, 1903, 36,318 cars, increased tonnage capacity 519,410 tons or 65 per cent. December 31st, 1904, 35,772 cars, increased tonnage capacity 535,925 — or 64 8/10 per cent. December 31st, 1905, 36,890 cars, increased tonnage capacity over 1900 of 636,620 tons or 77 1/10 per cent. December 31st, 1906, 46,673 cars, increased tonnage capacity 1,229,997 tons or 149 2/10 per cent. December 31st, 1907, 46,965 cars, increased tonnage capacity 1,266,460 tons or 153 6/10 per cent.

Q. The tonnage capacity of the cars which you have been giving us on the several dates referred to in the statement related to cars owned by the mines east of Pittsburg?

A. Yes, sir.

Q. And do not include equipment owned by the mines and Pennsylvania system west of Pittsburg?

A. No, sir.

Q. Will you give us the volume of shipments moving or transported from mines located on Pennsylvania lines east of Pittsburg, beginning with the year 1900 and running down to the year 1907?

Mr. COLE: What is the purpose of this?

112 Mr. GOWEN: The purpose is to show the extent to which the increase of equipment kept pace with increase in shipments.

Mr. COLE: Is it for the purpose of showing you didn't have an adequate equipment?

Mr. GOWEN: No, for the purpose of showing we had an adequate equipment.

Mr. COLE: We will admit you had an adequate equipment and you needn't show it. We will admit of record that the defendant during the whole period of this action had an adequate equipment.

The COURT: For what?

Mr. COLE: For the handling of our traffic and the other traffic in the neighborhood.

Mr. GOWEN: Had an adequate equipment for the transportation of the volume of coal which it had reason to believe would be offered to it by all of its shippers.

Mr. COLE: We had reason to believe and believe they had all the cars we needed.

Mr. GOWEN: Just let me get the shipments. Then I am going to follow it by one offer I know you will object to.

Mr. COLE: We say it is entirely immaterial. They don't defend or pretend to defend on the ground they didn't have an adequate

equipment. We say if it is material in this case, we admit it, and I say this testimony is immaterial.

The COURT: We will hear the testimony.

By Mr. GOWEN:

Q. Give the volume of shipments transported from mines on the Pennsylvania Railroad from the year 1900 down to 1907?

113 A. I can't give you that prior to 1902.

Q. Start with 1902?

A. 1902, 26,480,837 tons. 1903, 28,192,193 tons. 1904, 27,119,029 tons. 1905, 30,279,682 tons. 1906, 32,726,478 tons. 1907, 39,407,324 tons.

Q. Mr. Trump, during the period of the action the defendant had in force through rates and through routes with other railroad companies for shipments of coal, had it not?

A. Yes sir.

Q. To points both within and without the State of Pennsylvania?

A. Yes sir.

Q. In transporting shipments moved under those through rates and over those through routes to points outside of the State, which were located on other lines of railroad companies, did the cars of the defendant in which the shipments were loaded or were the cars of the defendant in which the shipments were loaded turned over to the other railroad companies on whose lines the points of destination were located?

A. They were, yes sir.

Q. Were those shipments very great in volume?

A. Quite large, yes sir.

Q. As the result of that practice, Mr. Trump, were there continually throughout the period of the action large numbers of cars of the defendant on the lines of other railroad companies?

A. The number of our hopper gondola cars on foreign lines during this period averaged between 30 and 40 thousand on foreign lines.

Q. That is, those were cars which had been loaded by the shippers on the lines of the Pennsylvania Railroad Company and had been consigned by them to points on other railroads?

114 A. Yes sir, at times we didn't have over 50 per cent of our own equipment.

Q. Now you have stated, I understood you to say, that throughout the period of the action the defendant's cars which were off its lines in that way ran from 25,000 to 40,000?

A. From 30 to 40.

Q. 30 to 40,000?

A. 30 to 40.

Q. And that was the condition which practically existed each day of the period of this action?

A. Yes sir.

Q. Some of these cars were on the lines west of Pittsburg?

A. Yes sir.

Q. And the defendant had some of the cars of the western lines on its road?

Mr. COLE: We object to the testimony of Mr. Gowen.

By, Mr. GOWEN:

Q. Were there during this period coal cars of western lines on the defendant's lines?

A. We had an average during that period of about 14 to 15,000 very regularly of the western equipment, consisting of gondolas and hopper cars, which we used jointly with our cars, reducing our cars away from home to from 15 to 25,000, ranging from 15, to 25,000.

Q. Mr. Trump, had the defendant not pursued the policy which it did and had confined its own cars to its own lines, what would have been the result as to the number of available cars for the shippers located on its lines?

Mr. LIVERIGHT: We object to the question as immaterial and irrelevant, it is spread out far enough already.

The COURT: I think we will hear it.

115 A. Very largely increased the number of cars available for coal shipment.

By Mr. GOWEN:

Q. Would there or would there not have been a large surplus of cars?

A. I think there would, yes sir.

Cross-examination.

By Mr. COLE:

Q. Well there wasn't any shortage as it was, was there? You had cars enough to handle the traffic, didn't you?

A. Not always, no sir.

Q. How many more do you think you needed?

A. We would like to have had the 15 to 25,000 that were on the other railroad.

Q. You say that would have constituted a large increase, you would have had a large amount of idle cars?

A. Yes, I think we would.

Q. You would have had a surplus then, wouldn't you?

A. I think we would.

Q. As a matter of fact during the period of this action there were no more cars off your line than under ordinary circumstances, were there?

A. No sir.

Q. This was about ordinary times as far as cars were concerned?

A. The cars away from home have been increasing gradually since 1902.

Q. This period covered by this action was no exception, was it?

A. No exception?

Q. No exception at all. Well now, Mr. Trump, didn't you have and use during all that time a large amount of other railroad cars?

116 A. Not a very large amount. We had I suppose on our line probably 1,000 foreign cars.

Q. How many?

A. About 1,000 I should say.

Q. About 1,000?

A. Yes sir.

Q. What kind of cars were they?

A. Readings, Lehigh Valley, Central Railroad. Some coming in here for supply coal, the majority of them coming in for supply coal.

Q. Don't you think you had more than 1,000 of those cars?

A. I don't think so.

Q. Didn't you use a lot of Huntington & Broad Top cars?

A. We stole a few once from them, yes sir.

Q. Then we are not the only people that you robbed?

A. No. In your interest we took liberties with other people's cars.

Q. Now, Mr. Trump, do you allege that the reason you didn't give Clark Brothers cars was because you didn't have them?

A. I didn't so state.

Q. You don't state so?

A. I didn't state that.

Q. Under this rating system that you have testified to here concerning coal mines was it possible for a mine to increase its capacity, its rated capacity?

A. Yes sir.

Q. Didn't you testify before the Interstate Commerce Commission as follows: By Examiner Brown: I see that very readily, but here is an operation let us say that has a rated capacity by your method of 6 cars a day. They desire and they can have orders ahead which would enable them to ship 10 cars. Now how would that operation

117 running all the year around and not speaking now of these small individual operators which do not work in the winter time as we know but one that is working the year round, how would this man increase his capacity to 10 cars a day? By Mr. Trump: He cannot. Didn't you so testify?

A. It would seem so. But as a matter of fact Falcon No. 4 increased 100 per cent, from 2 to 4 cars.

rating.

Q. But it didn't do it under your rule, did it?

A. It did it by virtue of the fact that they made developments and got the cars to make the shipments and the net result was they increased 100 per cent, from 2 to 4 cars.

Q. Didn't they take cars from other mines to put to that mine to get it?

A. I don't know.

Q. Don't you know the increase to that mine was just the falling off at other mines of cars they had?

A. At Falcon 4?

Q. Yes?

A. No, I don't know that.

Q. As a matter of fact had a mine ready to ship coal that was

capable of shipping 10 cars to start it, you would only rate him with 5 cars?

A. If it was a new mine?

Q. Yes?

A. The practice is to give him a development rating. That means as many cars as he can load up to six months.

Q. Take your rule you had, you would take the number of cars of his physical capacity and his shipping capacity, which was unknown because he hadn't shipped any, and divide that by two and that would give him 5 cars a day?

A. Yes sir.

Q. Now that is all the cars he could get, if you applied the rule to him, wouldn't it be?

A. Only in times of shortage when it becomes necessary to apply a percentage. The ratings are only percentages, they don't mean cars.

118 Q. That is true, you rate them in cars?

A. Yes sir.

Q. But it don't mean anything when you have got plenty of cars?

A. Not at all.

Q. And you don't pay any attention to it?

A. Don't pay any attention.

By the COURT:

Q. Then if a man orders 5 cars, he gets 5 cars, does he?

A. You mean when we have plenty of cars? Yes sir.

Q. If he orders 10, he gets them?

A. He gets 10.

By Mr. COLE:

Q. If he does order 10 and don't get 10, what does it mean in ordinary times?

A. It means there is a car shortage.

Q. Ordinary times don't mean a car shortage, does it?

A. No.

Q. Car shortage is not chronic with the Pennsylvania?

A. What I mean, Mr. Cole, is this. It don't make any difference under our system of rating whether you take the maximum physical capacity or whether you take the combination, the percentage of distribution is practically the same, it don't vary 1/10 of one per cent. So these ratings are simply an index of the way to apportion cars when they are short.

Q. Now in ordinary times like it was from 1905 to 1907 they don't apply at all, do they?

A. There are always days when we are short and days when we are over. For instance, we run Sunday and everybody else is closed down Sunday, both at the unloading points and loading points. We frequently have an excess number of cars on Monday, which falls off during the week, as Mr. Creighton testified to.

119 Q. It appears here from one report that the Glenwood mines got

61 cars on Saturday and it is the biggest allotment they ever got. How do you account for that?

A. I can't account for that.

Q. You can't account for that?

A. No sir.

Q. You knew that Clark's were complaining during the whole period of this action because they didn't get cars enough, didn't you?

A. Yes sir.

Q. That was frequently brought to your attention, wasn't it?

A. Yes sir.

Q. Now you say, you won't say the reason they didn't get cars was because you had a car shortage?

A. I can't say that in the abstract, no sir.

By Mr. GOWEN:

Q. Throughout the whole period of this action was it or was it not a fact that, due to the requisitions or orders put in by shippers, a percentage distribution of cars was necessary?

A. Yes sir.

Q. That was true of the whole period, wasn't it; I mean there may have been occasional days here and there?

A. Practically true of the whole period.

Q. And when Mr. Clark complained to you, as he did in writing and I suppose personally, what answer did you give to him in a general way?

A. In a general way, that he was getting his percentage of cars.

Q. Was or was not his main cause of complaint the system of ratings which had been adopted?

A. Largely so, yes sir.

120 By Mr. COLE:

Q. Now I want to ask you once more and see if we can't settle it, whether or not the period from October, 1905, to May, 1907, were ordinary times in railroading and coal business, or whether they were stress times during that whole period?

A. My recollection is that 1905 was a fairly good year. 1906 was a fairly good year, with the exception of the strike period and shows that it was an average year from the tonnage shipped, which I have given you. And 1907 was the best year that we had. We moved more coal tonnage and I presume the car shortages was more acute on the whole in 1907 than they were in 1906.

Q. If that is all the answer you have to make, that is all.

121 GEORGE W. CREIGHTON called on part of Defendant, being duly sworn and examined, testified as follows:

By Mr. GOWEN:

Q. What position did you hold with the Pennsylvania Railroad in the years 1905 and 1906 and 1907?

A. General superintendent of the Pennsylvania Railroad Division.

Q. And where were your headquarters?

A. At Altoona.

Q. Did you have general supervision of the actual distribution of the cars to the shippers in the Tyrone and Cambria & Clearfield regions?

A. It was done through my office, yes sir.

Q. It has appeared in the testimony that numbers of cars delivered at the plaintiff's mines were not uniform in number from day to day but varied quite a good deal. Will you state whether, having regard to the question of car distribution, it is possible to prevent that, or it is possible to make a daily uniform distribution which shall give to shippers the same quantity of cars every day?

A. You mean to say a regular number of cars per day?

Q. Yes?

A. No, it is not.

Q. Explain why that is not possible?

A. Well a great many reasons why; in the irregularity of unloading; irregularity of movement; the flow of cars is not at all regular in point of numbers or uniform in point of numbers. The greatest irregularity that we have is involved when we are working seven days a week, as we are for instance today in cleaning up, as we term it in the east. We get a larger supply of cars, more nearly a full supply of cars on Monday than any other day and at times even that varies. On Mondays and Tuesdays the supply is
122 larger and the proportion of cars or the total number of cars decreases then towards the latter end of the week; increasing again on Monday.

Q. During the period of the action was distribution promptly made of empty cars that came back into the coal regions?

A. Oh yes, that is one of the things that is always done.

Q. And that was so during the period of the action?

A. Unless there is no demand for cars, the empty cars are placed very promptly.

Q. I wish you would just state a little more fully, I don't think perhaps the jury quite understood you, I didn't, just what serves to make the flow of the empty cars back into the region irregular?

A. It is pretty hard to cover every detail of the operation which does make them irregular. Starting out at the beginning of the week, for instance, — are not unloaded on say Sunday, but there is always more or less of an accumulation at terminal points which we clean up by working on Sunday and we get from 80 to 100 per cent, even in times like the present we will have from 80 to 100 per cent of cars for all fields on Monday. Tuesday there will be a few less and so on, the proportion decreasing toward the latter end of the week, when again the Sunday clean up will give us a good many cars which ordinarily we wouldn't get. You may have a wreck that would interfere for hours in the delivery of cars, it may hold up your movement on the main line and consequently the cars can't get to the outlying fields for the early distribution.

Q. The return of the empty cars, of course, is regulated by the time they are unloaded by the consignees?

A. Yes, that is a very important factor.

Q. Then how is it as to cars which went off your lines?

A. We have got to wait until our neighbors return them in the ordinary course of business.

123 Q. Can you regulate the time?

A. We have no command of it at all.

Q. During the period of this action was the movement of cars, both loaded and empty, over the Tyrone Division, conducted without any interruption due to the number of cars on it, or detentions?

A. I am not quite clear that I understand what you mean by that question.

Q. I say during the period of the action was or was not the operation of the Tyrone Division at all interfered with or delayed by reason of the number of coal cars handled, individual or fuel whatever they were, which you had to move over the Division?

A. In other words, were we able to promptly handle the business of the Division?

Q. Promptly handle, yes sir?

A. I never knew why we couldn't place the cars available promptly.

Q. Not merely in placing the cars, but in the general handling of the cars?

A. There was no delay incident to what you would — operation.

Q. Was there any delay on account of the number of cars which went in on that Division?

A. You mean were there too many cars to handle?

Q. Yes,

A. Oh no. If there should such a thing happen for a moment and there is a demand for the cars we would simply put on more engines and crews.

124 DEFENDANT'S EXHIBIT No. 3.

(Copy of Defendant's Exhibit No. 3.)

"Interstate Commerce Commission.

WASHINGTON, — — —.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the complaint filed in the case of Clark Brothers Coal Mining Company v. Pennsylvania Railroad Company, docket No. 1111, the original of which is now on file and of record in the office of said Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 28th day of October, 1912.

[Seal of Interstate Commerce Commission.]

JOHN H. MARBLE, *Secretary.*

Refer to Docket No. 1111 your Answer.

Interstate Commerce Commission of the United States.

CLARK BROTHERS COAL MINING CO.

VS.

PENNSYLVANIA RAILROAD CO.

Petition for Hearing, Adjudication of Damages, and Restraining Orders.

DAVID L. KREBS,
For Petitioner.

125

DEFENDANT'S EXHIBIT No. 3.

Refer to Docket No. 1111 in your Answer.

Interstate Commerce Commission of the United States.

No. —.

CLARK BROTHERS COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY.

To the Honorable the Chairman and Associate Members of the Interstate Commerce Commission.

The Clark Brothers Coal Mining Company, a corporation organized and existing under and pursuant to the laws of the State of Pennsylvania, and having its office and place of business in the City of Philadelphia, State aforesaid, complainant, respectfully sets forth:

First. That your complainant, the corporation as aforesaid, is the lessee of a body of valuable bituminous coal, situated in the Township of Bigler, County of Clearfield, Pennsylvania, and has been so for a time prior to the fifteenth day of October, 1905, and still remains the lessee thereof to the date of the institution of this proceeding, and has said body of bituminous coal opened and developed for mining and shipping high grade and extra quality of coal therefrom, and has constructed and opened thereon its three certain coal mines and mining plants, with tipples, chutes, tracks and all necessary appliances for delivering the coal from the mouth or opening of said mines and into the railroad cars for the purpose of transporting the same into the open market and to points and places beyond the State of Pennsylvania, and to points and places in New York, New Jersey and New England; and that it has been so engaged in mining, shipping and selling coal to points and places beyond the State of Pennsylvania for a period beginning on or about the fifteenth day of October, 1905, and continuing to the date of the filing of this complaint. That

it has all the necessary equipment for the purpose of mining and producing bituminous coal from said leased premises in large quantities.

Second. That the Pennsylvania Railroad Company is organized and exists under the general and special laws of the State of Pennsylvania; that by the terms of its charter bearing date the thirteenth day of March, 1846, as well as by the Constitution of the State of Pennsylvania of 1874, it is a common carrier and public highway. That it is the owner of and controls the policy and management of the Tyrone & Clearfield Railway Company and its various extensions and branches, which is also a corporation organized and existing under the special and general laws of the State of Pennsylvania aforesaid; and that said Tyrone & Clearfield Railway Company has been merged with other lines and branches owned and controlled by the Pennsylvania Railroad, under the common name and charter of the Cambria & Clearfield Railroad, which is also by virtue of the Constitution and laws of said State, a common carrier and public highway, and that said division formerly known as the Cambria & Clearfield Railway was and is one of the main branches of the Pennsylvania Railroad Company engaged as a common carrier of Interstate commerce.

Third. Your complainant further relates and says, that on the fifteenth day of October, 1905, and at all times between that date and the time of the presentation of this complaint, it was fully equipped and provided with the mine openings, tracks, tipples, scales, chutes, mine cars and all other machinery, equipment and buildings necessary for the proper and economical mining of its coal and for the preparation of the same for immediate shipment and transportation to localities and markets where the same could be sold, more particularly to the localities and markets beyond
127 the State of Pennsylvania; and that your complainant's only business consisted of the mining and selling of its coal by private contract or in the open market at such prices as might be remunerative and profitable to it, and that at all times heretofore within the period mentioned your complainant has constantly kept employed in the working hours of each day mine foremen and miners capable of carrying on the practical work of mining and preparing its coal for transportation to market; that the number of men thus employed and kept present at each of its coal mines and mining plants varied from time to time during the period of time mentioned in accordance with the ability of your complainant to obtain railroad cars for the transportation of its coal to market.

Fourth. Your complainant further respectfully submits that it has upon its leased premises aforesaid three mines or collieries, known and designated by its Falcon No. 2, Falcon No. 3 and Falcon No. 4. That the output or physical capacity to produce coal daily of Falcon Mine No. 2 now is and for a long time past has been six hundred gross tons per working day; and that the physical output capacity of Falcon No. 3 has been during the period of time aforesaid and now is one hundred and twenty gross tons per working day; and the physical output capacity of Falcon Mine No. 4 during the

period of time aforesaid and now is two hundred and seventy-five gross tons per working day, provided that facilities were granted your complainant for the transportation and carriage of its coal into the bituminous coal markets; and that your complainant has been fully prepared during all of said period of time since the fifteenth day of October, 1905, to the date of the filing of this complaint, with the necessary appliances for mining and shipping from its mines aforesaid, Nos. 2 and 3, seven hundred and twenty (720) gross tons and since the first of January, 1906 from Nos. 2, 3 and 4, at least nine hundred and ninety-five gross tons each working day,
128 if the necessary railroad cars for transporting the same to market had been furnished by the Pennsylvania Railroad Company and its subsidiary branches and lines as your complainant believes it is required to do under the common law and also in compliance with the provisions of the Act relating to Interstate Commerce, approved the 4th day of February, 1887, and the several supplements thereto, as well as also under the Act of Congress of the 29th of June, 1906, and had your complainant received from the Defendant Company the same equal facilities which it gives and grants unto other miners and shippers of coal along its lines and branches, and particularly on the lines and branches of the Cambria & Clearfield Division of its railroad, and which equal facilities it was its duty to give and grant to the complainant.

Fifth. Your complainant in this behalf further relates and sets forth, that it has been and is now engaged in mining and shipping coal to points and places of delivery and to the coal markets beyond the State of Pennsylvania, and that it has during all the period of time aforesaid, to wit, from the fifteenth day of October, 1905, to the date of the filing of this complaint, and now has orders for coal to be mined and shipped beyond the lines of said State; and that it has been and is now engaged in Interstate Commerce as a miner and shipper of bituminous coal; and that as appears by the facts herein-after stated, the said Pennsylvania Railroad Company has unjustly made and given an undue and unreasonable preference and advantage to other firms, co-partnerships and corporations engaged in mining and shipping coal along the lines and branches of the Cambria & Clearfield Railroad, aforesaid, not only in the furnishing and delivery of cars for the transportation of coal mined but also in the rating capacity of your complainant's mines as compared with the rating capacity of the mines of other corporations, co-partnerships, firms or individuals mining and shipping bituminous
129 coal from its main line and division designated and known as the Cambria & Clearfield Division.

Sixth. That the Pennsylvania Railroad Company has assumed the right and has undertaken to fix or rate the daily output capacity of the various mines opened and operated along its lines and branches, and has so rated the mines operated by your complainant, giving to your complainant a rating capacity on its distribution sheet, from which rating distribution of cars purports to be made to wit:

Gross tons.

Falcon No. 2 9 cars of 35 net tons capacity.

Falcon No. 3 1 " of 35 net tons capacity.

Falcon No. 4 2 " of 35 net tons capacity.

The present rating as furnished complainant under date of April eighteenth, 1907 is as follows, viz:

Falcon No. 2 12 cars of 35 net tons capacity.

Falcon No. 3 2 cars of 35 net tons capacity.

Falcon No. 4 5 cars of 35 net tons capacity.

That the above stated rating of the output capacity of your complainant's mines appears by the rating and distribution sheets of the Defendant Company, as aforesaid, and is the basis upon which the distribution of railroad cars for hauling and transporting coal to the markets, both State and Interstate, is alleged to have been based and upon which the distribution of railroad cars is alleged to have been made from day to day by the agent and employees of the Defendant Company.

Seventh. Your complainant further says, that said rating of the output capacity of the aforesaid mines, Falcon Nos. 2, 3 and 4, arbitrarily made by the Defendant Company, is grossly unjust and unequal in comparison with the rating given to other persons, firms and corporations mining and shipping coal from the Cambria & Clear-

130 field Division. That your complainant is justly and reasonably entitled to a rating of a daily output capacity of nine hundred and ninety-five gross tons of coal from its mines aforesaid, and that said capacity has been verified by the agents and representatives of the Defendant Company and has, as your complainant believes, been reported to W. W. Atterbury, General Manager, and to Michael Trump, General Superintendent of Transportation of the Pennsylvania Railroad, after a careful examination of your complainant's mines and equipment and facilities for mining and loading coal. Notwithstanding said capacity the Pennsylvania Railroad Company, and its officers and agents, have refused and declined to give and grant unto your complainant said rating output capacity, and have willfully and deliberately with effect thereby to deprive your complainant of its due and just proportion of coal cars for distribution upon its road rated it at a capacity as shown in Paragraph six.

Eighth. Your complainant further says, that since the fifteenth day of October, 1905, and until the presentation of this complaint, your complainant has day by day made requests and given orders for coal cars to be delivered to its mines aforesaid, to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but your complainant has been denied and refused cars and has been unduly and unreasonably discriminated against in the distribution of coal cars through and by means of said unjust and unfair rating of its output capacity, so that it has been at different

times, varying in duration, compelled to close its operations and remain idle, and that its organization and plant thereby became demoralized and disorganized to its loss and damage, while the mines of other operators engaged in mining and shipping coal on the said Cambria & Clearfield Division have been fully kept and supplied with railroad cars, not only to an amount greatly in excess of a fair and just pro rata distribution of the daily supply of railroad cars but in excess of their actual daily output capacity, if the mines
131 aforesaid were properly rated in comparison with the output capacity of your complainant's mines.

Ninth. Your complainant further avers, that it is informed and expects to prove on the hearing had upon its application, that the Defendant has adopted an alleged method or system of averages, ascertained by adding to the number of tons of the daily physical output capacity of your petitioner's mines, the average daily actual output as shown by the shipments for a period of time, which your complainant is informed is one year, and then dividing this sum of actual physical output with actual daily output by two, and in this manner fixing the rating of your complainant's mines for output capacity as the basis of daily car distribution. And your complainant avers that this system of ascertaining complainant's daily output capacity as the basis for daily distribution of cars is undue, unfair and unreasonable, and gives and grants an advantage and preference, not only in the rating of the mines of other firms, co-partnerships and corporations, who are furnished with a full supply of cars, but in the distribution of cars also, in that the Defendant having failed and refused to furnish your complainant cars based upon its physical output capacity during the period of time taken into consideration for ascertaining its actual daily shipments, is thereby rendered liable by said system to have its rating reduced, while other shippers, and particularly those furnished Company coal and owners of individual cars, are enabled to keep their rating of actual output equal to their physical capacity and receive in the daily distribution of cars at times a much greater number than they can actually load.

Tenth. Your complainant avers in this behalf that the system of rating the output capacity of its mines and the distribution of cars made or based upon said rating thus ascertained, is illegal, unjust and inequitable, and necessarily produces an undue and un-
132 reasonable preference and advantage to the firms and corporations and individuals upon the Defendant's lines and branches that own individual cars and also receive their pro rata share of Defendant's own cars, as well as to those firms, individuals and corporations that are engaged in supplying coal to the Defendant Company for its own uses and purposes. That this system or method of distribution has been in force with knowledge on the part of the Defendant, and its agents and representatives, during all of the period of time, to wit, from the fifteenth of October, 1905, to the date of the filing of this complaint.

Eleventh. Your complainant further avers that in the distribution of its daily supply of cars by the Defendant it frequently hap-

pens, whether intentionally or not your complainant does not certainly know, that the delivery of such cars as is made is at so late a period in the day that its miners and day laborers, under the rules of their labor organizations, have left the mines so that the complainant is unable to have the same loaded on the day that they are placed at the mines; and such cars are not only charged against your complainant for the day on which they are delivered to its mines but also for the succeeding day on which they are loaded and consigned for transportation and therefore the complainant's share of cars is unjustly, unfairly and illegally reduced and it is deprived of its due and equal pro rata share of cars.

Twelfth. Your complainant further says, that it is advised and believes that it is the duty of the Pennsylvania Railroad Company to furnish to your complainant an adequate and sufficient supply of coal cars to enable your complainant to meet the ordinary and usual requirements of the coal trade, and especially to ship to the points and places beyond the State of Pennsylvania from which it had and has orders for coal to supply the demand of its usual trade;

133 that because of the failure and refusal of the Defendant Company to furnish such adequate and sufficient supply of coal cars to meet said ordinary and usual requirements of the Interstate coal trade, your complainant has been put not only to great disadvantage but has been unable to operate its mines and to mine and ship to market its coal which it was at all times ready and able to mine, and for which it had orders for the purchase and sale of the same by dealers in and consumers of coal, some of which orders it was unable to fill promptly and causing serious loss and many others it was unable to take and fill for the causes aforesaid. All of said orders calling for delivery of coal at points and places in the State of Maryland, New Jersey, Massachusetts, New York, as well as other points and places without the State of Pennsylvania, and your complainant avers it has been unjustly and unlawfully denied an adequate and sufficient supply of coal cars for the transportation of its product by the Defendant Company.

Thirteenth. Your complainant further in this behalf avers, that it is informed and believes it to be true that the supply of coal cars provided by the Defendant is wholly inadequate and insufficient to convey and transport to the Interstate markets and to points and places beyond the State of Pennsylvania, the coal which your complainant could and would mine and produce in order to meet the demand and orders for its coal and coal which could and would be mined and produced by other miners and producers of bituminous coal along the main line and branches of the Defendant Company, and during the usual and ordinary conditions of the coal trade and in the usual and ordinary conditions of the supply and demand for bituminous coal. That of the total supply of cars on Defendant's main line and branch roads the average distribution for a long time prior to the presentation of this application, has been upon the following basis:

134	System cars (P. R. R.) for company coal.....	21 per cent.
	Foreign cars (Other railroads) for supply coal..	6 per cent.
	System cars (P. R. R.) for commercial coal.....	25 per cent.
	Foreign cars (Other railroads) for commercial coal...	3 per cent.
	Individual cars	45 per cent.

Your complainant avers in this behalf, that the inadequacy of coal cars furnished and supplied by the Defendant Company is wholly inexcusable and it is without just cause for its failure to comply with its duty as common carrier, in that it is possessed of large assets and financial credit and is expending large amounts of money for other developments and improvements and purchase of stock in other railroad corporations, and not keeping an adequate and sufficient supply of coal cars to meet the ordinary exigencies of its coal trade business.

Fourteenth. Your complainant further avers, upon information and belief, that the Tyrone & Clearfield Railway (formerly so known) and its several branches and extensions, and now embraced within the Cambria & Clearfield Division, has been for a long time past and is now being unjustly discriminated against as a division in the distribution of coal cars, and that the miners and shippers of bituminous coal from and off said Tyrone & Clearfield branch and its extensions and sub-branches, have by reason of said discrimination and deprivation of its due and just proportionate share of coal cars been unjustly and unlawfully deprived of the percentage or pro rata share of their cars which they would otherwise have been entitled to except for such discrimination against said division or branch line, and that an undue and unlawful preference has thereby been given to the miners, producers and shippers of coal off and from the other branches and divisions of the Defendant Company.

135 Fifteenth. Your complainant further in this behalf avers that because of the aforesaid undue, unreasonable and unlawful discrimination in rating the output capacity of its mines, and the unjust, unreasonable and unlawful refusal to give and grant to your complainant the rating of output capacity to which it was and is justly and legally entitled; and also because of the undue, unreasonable and unlawful discrimination in the daily distribution of cars for the transportation of its coal into the Interstate markets; and also by the Defendant's failure to perform its duty as a common carrier, in that it constantly during all of the period of time from the fifteenth day of October, 1905, to the date of the presentation of this petition, has failed, neglected and refused to furnish your complainant an adequate and sufficient supply of coal cars to transport to Interstate markets the coal for which it had a demand, the Defendant Company has done great and unlawful injury to your complainant and caused it to suffer great loss and damage in its business as a producer, shipper and seller of bituminous coal in the Interstate markets and coal trade; as well as has caused it to suffer great loss and damage in the loss of its trade; disorganization of its force; in the development of its business; in the increased cost of production and in other ways; and that said loss and damage, in the aggregate,

amounts to the sum of Thirty-six Thousand Four Hundred One and 12/100 (\$36,401.12) Dollars.

Relief Prayed.

Your complainant, therefore, prays the Interstate Commerce Commission to appoint a time and fix a place to hear the testimony in support of the allegations hereinbefore set forth and to ascertain and determine.

(a) The amount of damages which the complainant has suffered and which it is entitled to recover because of the undue and unreasonable preference and advantage given to other shippers over the lines and branches and connecting carriers of the Defendant Company, in the methods and manner hereinbefore set forth and enumerated, between the fifteenth day of October, 1905, and the date of the filing of this petition, as well also because of its failure and refusal to furnish the petitioner an adequate and sufficient quantity of coal cars to carry its product to the Interstate market.

(b) That your Honorable Commission will adjudge, order and decree, that the Defendant furnish the complainant its pro rata share of coal cars for daily distribution upon its main line and without discrimination against the Tyrone & Clearfield Branch or Division of the Defendant's road, in the allotment or daily distribution of cars in favor of any other divisions, or branches; such pro rata share to be ascertained and determined by its physical output capacity; without any deductions therefrom for any causes whatsoever; and more particularly without any deductions made by any system of averages taken from the amount of shipments during any preceding period of time during which the complainant has been unjustly and unlawfully denied its just equal share of cars; but upon an accurate, just and fair rating of the physical output capacity of its mines compared with the physical output capacity of mines operated by other miners and shippers of bituminous coal in the Counties of Clearfield, Cambria and Somerset, and situate along Defendant's roads and shipping thereon.

(c) That your Honorable Commission adjudge, order and decree, that the Defendant shall not hereafter deduct from your complainant's due and just pro rata share of cars the cars which are placed at its mines at a period and time too late during working hours to be loaded on the day of their delivery and then again deduct from its share the same cars as so many cars delivered on the day when loaded and consigned for transportation.

(d) That your Honorable Commission will by proper order and decree, require the Defendant to provide and furnish to your complainant an adequate and sufficient supply of coal cars to enable it to have transported to the coal markets, at points and places beyond the State of Pennsylvania, the coal for which the complainant has continually had and now has orders and demands in the ordinary and usual course of the supply and demand of the bituminous coal trade.

(e) That your Honorable Commission will also make such other and further order as will protect it against the illegal and unjust discrimination heretofore committed.

(f) That your Honorable Commission will order, direct and require that the answer which may be made to this complaint be verified by the affidavit of W. W. Atterbury, General Manager and of Michael Trump, General Superintendent of Transportation of Defendant Company.

STATE OF PENNSYLVANIA,

County of —, ss:

Before me, —, a Notary Public in and for said County and State, personally came J. O. Clark, President of the Clark Brothers Coal Mining Company, who being duly sworn says, the facts contained in the foregoing petition and complaint are true and correct to the best of his information, knowledge and belief.

Witness my hand and official seal this — day of June, A. D. 1907."

138

DEFENDANT'S EXHIBIT No. 4.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. Minds and William J. Matz, Lately Trading as The Bulah Coal Company,

v.

SAME.

Submitted April 20, 1911; Decided March 11, 1912.

Reparation Awarded for Damages Resulting from Discriminations Practiced by the Defendant in the Distribution of Coal Cars.

David L. Krebs, Harry White and A. M. Liveright for Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company.

William A. Glasgow, Jr., and John H. Hall for W. F. Jacoby & Company.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and James H. Gleason for Bulah Coal Company.

George V. Massey, Francis I. Gowen and Murray & O'Laughlin for defendant.

139

Supplemental Report of the Commission.

HARLAN, Commissioner:

In *Joynes v. P. R. R. Co.*, 17 I. C. C., 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money damages of that nature, arising out of discrimination ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our conclusion in *Joynes v. P. R. R. Co.*, supra, had been announced, the circuit court of the United States for the eastern district of Pennsylvania, in *Morrisdale Coal Co. v. P. R. R. Co.*, 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to

140 ascertain and enter judgment for the damages so sustained.

The court held that this Commission alone could entertain a complaint of that nature. See also *Morrisdale Coal Co. v. P. R. R. Co.*, 183 Fed., 929.

It will be seen therefore that with respect to the principle announced in *Joynes v. P. R. R. Co.*, supra, there is a conflict of view between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defend-

ant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C., 356; *Jacoby & Co. v. P. R. R. Co.*, 19 I. C. C., 392; and *Bulah Coal Company v. P. R. R. Co.*, 20 I. C. C., 52. And therefore, in proceeding for the reasons explained to exercise jurisdiction to award damages, no statement of the facts need be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

141

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392. We now find that the damages sustained by this claimant as the result thereof amounted to \$31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim as stated in the original petition was \$36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

(a) That the mines known as Falcon Nos. 2, 3 and 4 had an average output capacity of 600 tons, 120 tons, and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(b) That dividing the time in question into two periods, one prior to March 31, 1906, and the other from August 1, 1906, to May 1, 1907, as we have done in the *Hillsdale* case, *supra*, the complainant could have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that mine 11,812.76 tons and 21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it
142 would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(c) That from Falcon No. 3 the complainant could have shipped and sold 7,707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1,184.66 tons and 3,018.90 tons, respectively, making its output 6,522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped

to points without the state of Pennsylvania 3,866.72 tons and 6,423.93 tons in the respective periods.

(d) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold, and shipped during the first period 12,210 tons and during the second period 34,145.10 tons, whereas it actually was able to ship but 2,306.12 tons and 11,105.54 tons; that it therefore shipped 9,903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion of the cars; and that of this shortage 9,184.85 tons represents what would have been interstate business during the first period, and 8,497.02 tons during the second period.

(e) That the average selling price of the coal mined at Falcon No. 2 during the first period was \$1.289 per ton and during the second period \$1.25 per ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and 96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3 was \$1.20 during both periods and the cost of production 92 cents and 96 cents during the two periods; that the average selling price at Falcon No. 4 was \$1.07

per ton during the first period and \$1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; and Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(f) That the actual cost of production is shown by the record as \$1.1419 per ton during the first period and \$1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was \$1.166 per ton during the first period and \$1.311 per ton during the second period; that the actual cost at Falcon No. 4 was \$1.017 and 90 cents during the respective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3; and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of producing the coal actually sold and shipped to interstate points during the period in question.

144 In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adopted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this,

however, rests with the parties; in such a case we can accept only the responsibility that follows upon a careful study of the record and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the complainants that their damages should be estimated on the basis of a supply of coal cars according to the physical capacity of their mines, or at least on the basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argu-

145 ment and brief on behalf of the defendant there is no sound theory upon which the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justifiable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the state courts, to which reference has heretofore been made, the supreme court of Pennsylvania, in 229 Pa., 261; 78 Atl., 28, said:

As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. * * * Counsel for appellant argued that because as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground and might be available for future shipment, and as there was no evidence that prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for his coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose.

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

Supplemental Orders.

At a General Sessions of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912.

147

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above named Defendant be, and it is hereby, authorized and directed to pay unto complainant, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of \$31,127.96, with interest thereon at the rate of 6 per cent per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

148

(COPY OF DEFENDANT'S EXHIBIT No. 5.)

Opinion No. 1384.

Before the Interstate Commerce Commission.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY &
COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

Decided March 7, 1910.

Report and Order of the Commission.

149

DEFENDANT'S EXHIBIT No. 5.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY &
COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

Submitted January 30, 1909. Decided March 7, 1910.

1. The special allotment daily of 500 of its system coal cars to a particular operator for the purpose of supplying foreign steamships with coal found to be a discriminatory practice so long as they were not counted against the rating of those mines during periods of car shortage. A like view expressed of the sale by the defendant of 1,000 of its coal cars to the same operator.
2. Following *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, ante, p. 356, defendant's rules and regulations for the distribution of coal cars during periods of car shortage found to be unlawful.

Harry Boulton, John H. Minds, William A. Glasgow, Jr., and John William Hallahan 3d, for W. F. Jacoby & Company.
David L. Krebs for Clark Brothers Coal Mining Company.
Francis I. Gowen and George V. Massey for defendant.

150

DEFENDANT'S EXHIBIT No. 5.

Report of the Commission.

HARLAN, Commissioner:

The mines of the complainant in Hillsdale Coal & Coke Co. v. P. R. R. Co., just disposed of (ante, p. 356), are located near the town of Glen Campbell, in Indiana County, in the State of Pennsylvania, on the Cush Creek branch of that part of the defendant's Cambria and Clearfield division which extends northward from Crescon; and the chief competitor of that complainant has been D. E. Williams & Company, whose mines are in that district. In the above-entitled complaints the mines are in another mining district in the bituminous coal regions of Pennsylvania and on another part of the Cambria and Clearfield division of the defendant. They are located about nine miles west of Osceola Mills, in or near the town of Smoke Run, in Clearfield County, on what is known as the defendant's Moshannon branch, which, at Osceola Mills, joins its so-called Tyrone division extending northward from its junction with the main line at Tyrone. Since October, 1905, the Clark Brothers Coal & Mining Company has operated, under leases, three mines known as Falcon No. 2, No. 3 and No. 4. The largest and best equipped of these mines, Falcon No. 2, was operated prior to that time by the petitioner, W. F. Jacoby & Company, which had taken over the lease of the mine in April, 1904.

It is Falcon No. 2, and the period from April, 1904, to October 1905, that are involved in the first of the above-entitled complaints. That mine is said to be one of the best equipped collieries in the district, and on April 1, 1904, had an inventory valuation of \$30,000. It is provided with an underground electric system for hauling its mine cars and with a first class wooden tippie and a patent dump; it is also well supplied with mine cars and has ample switch-track facilities; and its grades favor the out-movement of loaded mine cars.

There are said to be from 175 to 200 acres of solid coal in the
151 three Falcon mines, varying in thickness from $2\frac{1}{2}$ to 5 feet; and in No. 2 mine there were, in 1904, about 100 acres of coal remaining, some 30 acres having been mined prior to that time. The coal is accepted as a superior grade of steaming coal that is readily marketed in New England, New Jersey, New York, and Pennsylvania, being shipped all rail over the defendant's lines to those points and also to tide water.

It is not contended that there was any unfairness in the rating assigned to Falcon No. 2 during the period from April, 1904, to October, 1905, when it was being operated by the complainant, W. F. Jacoby & Company. The rating then given to it was 450

tons a day and this the complainant in that case admits was a close approximation of its actual output capacity. It appears, however, that from October, 1905, to May, 1907, when Falcon No. 2 was being operated by the Clark Brothers Coal & Mining Company the rated capacity credited to the three Falcon mines was 9 cars or 315 tons for No. 2, 1 car or 35 net tons for No. 3, and 2 cars or 70 net tons for No. 4, making a total capacity of 12 cars or 420 tons for the three mines. In April, 1907, these ratings were increased to 13 cars or 455 tons for Falcon No. 2, 2 cars or 70 tons for Falcon No. 3, and 5 cars or 175 tons for Falcon No. 4, making an aggregate capacity to the three mines of 20 cars or 700 tons daily. The complainant in the second of these complaints, in support of the theory, advanced also in the Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, that commercial capacity ought to be eliminated, calls attention to the fact that defendant in its answer admits that during the period in question the actual physical capacity of the three Falcon mines was 709 tons, 144 tons, and 270 tons, respectively, or a total of 1,123 tons in all, which would require 31.1 cars daily to move. On the other hand it is to be noted that the petitioner in the second complaint contends that the physical capacity of the three mines was only 600 tons, 125 tons, and 300 tons, respectively, or 1,025 tons in the aggregate per day. Finally it must be observed that neither of the petitioners made complaint to the defendant, at any time, of the ratings of their mines, and when finally they did complain the defendant accepted their engineer's statement or estimate as to their actual working capacity. Under these circumstances, we see no substantial basis for any finding of discrimination against the complainants with respect to the defendant's ratings of their mines.

The damages sought to be recovered in the first of these complaints amount to \$51,950.49 and in the second complaint to \$36,901.13. Falcon No. 2 was purchased from the Penn Collieries Company, in which W. F. Jacoby seems to have been interested. The transaction appears of record as a purchase, but it may have been a mere change of ownership on the basis of nominal values. Nevertheless, the record shows a purchase price of \$25,000 and that W. F. Jacoby & Company retained the mine until October, 1905, when they sold it for \$32,500, or for \$7,500 more than they paid for it. In the meantime they had mined 55,000 tons of coal and sold it apparently at a profit of about 30 cents a ton. Whether the mine could have been sold so well if more coal had been taken out of it by the complainant is a question as to which it is difficult to arrive at any satisfactory conclusion. It is to be noted, however, that the complainant claims to have had actual orders for a substantial portion of the output capacity of Falcon No. 2.

As we understand these cases, the substantial points upon which discrimination may be predicated are as follows:

There are a number of mines on the Moshannon branch of the defendant that are owned by other operators, but in this connection it will suffice to mention only the six mines operated by or for the Berwind-White Coal Mining Company, one of which, known as Eureka No. 27, immediately adjoins the complainant's Falcon No. 2.

2. The same "D" coal vein is worked in these two mines.
153 The quality of the coal is therefore the same and it is claimed that the capacities of the two mines were substantially the same at the period involved in the first of these two complaints. Falcon No. 2 is said in fact to have been better equipped, and if this was the case it would seem to have had an advantage over its neighbor if it had been placed on an equal footing in the matter of car supply.

But neither Falcon No. 2 nor the mines of the complainant, the Clark Brothers Coal & Mining Company, was placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal-car equipment during the period of the actions.

During the years 1902, 1903, and 1904 the employees of the defendant that were in charge of the distribution of coal-car equipment had special orders for giving to the Berwind-White Coal Mining Company a special allotment of 500 cars daily. That company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of a lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the coal and oil investigation. Few, if any, of these specially assigned cars reached the Berwind-White mines in this particular mining district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless, it was inequitable in principle and undoubtedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district.

154 Another point also mentioned in our report in the coal and oil investigation just referred to is that 1,000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company. The defendant to that extent diminished its capacity to supply the coal-car equipments of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors.

It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars in large numbers and were therefore kept in operation almost continuously while the complainants received an inadequate supply and were not able, therefore, to run their mines to the best

advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal. Under the rules of defendant, fully explained in *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, ante, the ownership of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby.

An order will be entered in accordance with these conclusions.

Orders.

At a General Session of the Interstate Commerce Commission Held at its Office, in Washington, D. C., on the 7th Day of March, A. D. 1910.

Present:

Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity

in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required, on or before the first day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled Report and Order of the Commission are true copies of the originals now on file in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of the Commission, this 26th day of November, 1910.

[Seal of Interstate Commerce Commission.]

E. A. MOSELEY, *Secretary.*"

157

(*Copy of Defendant's Exhibit No. 7.*)

Interstate Commerce Commission,
Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the report and order of the Commission in the case of Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company, No. 1063, the original of which is now on file and of record in the office of said Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 4th day of November, 1912.

[Seal of Interstate Commerce Commission.]

JOHN H. MARBLE, *Secretary.*

Opinion No. 1383.

Before the Interstate Commerce Commission.

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

Decided March 7, 1910.

Report and Order of the Commission.

158

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

Submitted January 25, 1909; Decided March 7, 1910.

1. To the physical capacity of a coal mine the defendant adds its commercial capacity tested by the shipments made from it during the preceding 12 months, and divides the sum by two; these two factors being revised quarterly the mine is thus given a constantly corrected rating in the distribution of coal cars during percentage periods. If this basis is equitably applied to all mines served by the defendant the Commission is unable to see that it results in an unequal, unfair, or discriminatory distribution of its equipment.

2. The complainant's contention that physical capacity alone is the fair and sound basis for rating coal mines for car distribution is not sustained; the utmost obligation of a carrier under the law is to equip itself with sufficient cars to meet the requirements of a mine for actual shipment; and it is of no real concern to the carrier what are the physical possibilities of a mine in the way of daily output except as that factor may afford some measure of what its actual shipments will be.

3. The Commission reaffirms its previous ruling to the effect that the owner of private cars is entitled to their exclusive use and that foreign railway fuel cars assigned to a particular mine cannot be delivered to another mine; but it again holds that all such cars must be counted against the distributive share of the mine receiving them. It is therefore, Held, That the defendant's rule, providing that the capacity in tons of such "assigned" cars shall be deducted
159 from the rated capacity of the mine receiving them and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" cars, is unlawful and discriminatory.

4. The defendant's contention that, so long as the petitioner receives all the coal cars it is entitled to, it has no right to complain

because some other operator receives an undue proportion of cars is not sustained. The law not only gives the shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier but the assurance also that no other shipper shall fare ratably better at the hands of the carrier.

5. The question of damages, which the complainant claims to have suffered as the result of the discriminations herein found to have been practiced against it, reserved for further argument.

David L. Krebs and Harry White for complainant.

Francis I. Gowen, George V. Massey, and Murray & O'Laughlin for Pennsylvania Railroad Company.

Report of the Commission.

HARLAN, *Commissioner*:

In this group of cases, of which the above-entitled complaint has been selected as the one in which the views of the Commission may best be expressed, the petitioners bring to our attention the method or rules in effect on the lines of the defendant, during the period mentioned in the complaints, for the distribution of coal cars among the coal mines which the defendant serves. In each case the petitioner demands an order by the Commission requiring the defendant so to change or modify its rules that the distribution of its coal-car equipment may be made on what they regard as a more equitable and just basis. Damages in large amounts are also asked in
160 order that the several complainants may be compensated for losses which they claim to have suffered by reason of the alleged failure of the defendant during the period of the action to give them the number of cars that they were justly entitled to receive.

The consideration of these complaints has been deferred because when they were submitted for decision, there were pending in the lower courts and before the Supreme Court of the United States cases involving not only the question of the soundness and legality of the rulings heretofore made by the Commission respecting the distribution of coal cars by interstate carriers, but involving also the power and authority of the Commission to control and enter orders in respect to the practices of interstate carriers in such matters. Under the circumstances it seemed wise to await the final disposition of those cases in the court of last resort before making any further announcement of our views with respect to the matter of coal-car distribution; and this course seemed particularly desirable in view of the fact that the defendant in this proceeding, although not a party to any of the appeals in the Supreme Court of the United States, had been permitted, upon its special request and because of its interest in the questions involved, to participate in the argument and presentation of the cases before that court.

The general status of the question before the Commission may be readily ascertained by an examination of our decisions in one or two formal proceedings since the passage of the so-called Hepburn Act. In *Railroad Commission of Ohio v. H. V. Ry. Co.*, 12 I. C. C. Rep.,

398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to
161 which the foreign railway fuel cars had been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars.

The order then entered to give effect to these conclusions was accepted by the defendant in that proceeding. But when the same general principle was applied by the Commission in *Traer v. C. & A. R. R. Co.*, 13 I. C. C. Rep., 451, to the distribution of company fuel cars the defendant in the latter proceeding declined to accept our order either as one within the power of the Commission to enter or as a just and proper disposition of the contention made upon the record. In the same report we disposed of similar complaints by the same petitioner against the Illinois Central Railroad Company and the Chicago, Peoria & St. Louis Railway Company. These companies also declined to obey our order. The result was proceedings in the United States circuit court for the northern district of Illinois, the Illinois Central and the Chicago & Alton being the moving parties, in which that court held that the complainant carriers were not entitled to relief from that part of the orders of the Commission that required private and foreign railway fuel cars to be taken into account against the distributive share of the coal companies receiving them, but were entitled to an injunction restraining the enforcement of the orders of the Commission in so far as they related to the cars employed by the complaining carriers in
162 hauling their own fuel coal. From this decree an appeal to the Supreme Court of the United States was prosecuted by the Commission and the whole question was considered by that tribunal in *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S. 452, and *Interstate Commerce Commission v. C. & A. R. R. Co.*, 215 U. S. 479, in which decisions have lately been announced.

The court there held, as the Commission had previously held in *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. Rep., 86, that the basis adopted by an interstate carrier for the distribution of coal cars among coal operators upon its lines was a regulation or practice "affecting rates" as that phrase is used in section 15 of the amended act to regulate commerce, and as such was a matter within the regulative power of the Commission. It was also held that the fuel cars of an interstate carrier, in which it hauls fuel for its own

use, are instruments of interstate commerce as fully as are its system cars in which commercial coal is hauled for shippers; and consequently "that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equitable distribution and the prevention of an unjust and discriminatory one." Drawing attention to the distinction that must necessarily be observed by the courts between the power to regulate and the unwise exercise of the power in a given case, that court disclaimed for itself, and also denied to any other federal court, the right to usurp the purely administrative functions of the Commission by substituting a regulation that the court might deem wise for one which it considered the Commission in the exercise of its conceded power had inexpediently adopted. The decree of the lower court enjoining the enforcement of the order of the Commission, in so far as it related to the distribution of company fuel cars, was therefore reversed.

* * * * *

163 We come now to the practice of the defendant in the past and at the present time in the distribution of its available coal-car equipment.

Under a rule announced by it on February 1, 1903, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

On January 1, 1906, the defendant divided all cars into two classes which it designated as "assigned" and "unassigned" cars. In the former class were its own fuel cars, foreign railway fuel cars, and individual or private cars loaded by their owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any "assigned" cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" or system cars. This order or rule of the defendant was the occasion of some comment in *Logan Coal Co. v. P. R. R. Co.*, 154 Fed. Rep., 497, 498, where the court says:

To illustrate the effect of the order on an individual number of cars as compared with a competitor receiving only company cars, take two operators each having mines rated at 500 tons a day, and assume that on any given day the company has enough of its own cars on hand to deliver to all mines cars which would take care of 70 per cent of the output. Assume that one operator

200 tons, while the other has no individual cars at all. The latter receives railway company cars capable of carrying 70 per cent of 500 tons, or 350 tons. The former, on the day in question, will receive individual cars in which he can ship 200 tons, and his rating for a distribution of the company's cars for that day will be reduced to 300 tons, 70 per cent of which is 210 tons, for the transportation of which he will receive company cars, so that the operation with the individual cars will be able to ship on the day instanced 410 tons, as against the shipment of 350 tons by the operator who has no individual cars. To this extent the relator has the advantage over its competitors who do not own individual cars, and it receives the exclusive use of its cars at all times.

The results arrived at by the court in its illustration seems to us not quite accurate, in that the total car capacity of 700 tons assumed by the court is made up of the company's system cars, and excludes from consideration the fact that one of the mines had on hand individual cars having a capacity of 200 tons, making a total available car capacity of 900 tons. Worked out on the basis of that total car tonnage the owner of the private cars would receive equipment enough to enable him to ship 463 tons and not 410 tons as stated by the court, while the mine depending upon system cars only would be able to ship 437 tons instead of 350 tons as stated by the court. The court used a car capacity of 70 per cent as the total available equipment for the output of both mines instead of a car capacity of 900 tons, or 90 per cent, which was actually on hand in the case assumed. In other words, the court absorbs in its illustration only 760 tons of the output of the two mines, while the facts assumed show that car capacity of 900 tons was available. Under the Commission's rule each mine under these circumstances would have been able to ship 450 tons.

165 Using the same two mines with an assumed capacity of 500 tons each a day and available equipment with a total capacity of 70 per cent or 700 tons, including the individual cars with a capacity of 200 tons owned by one of the mines, the rule of distribution which this Commission has approved in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.* and *Traer v. C. & A. R. R. Co.*, supra, would result in giving the latter mine its individual cars of 200 tons capacity and system cars enough to absorb 150 additional tons, or a total of 350 tons, being one-half of the available equipment tonnage. The mine not owning the individual cars would get the other half of the available equipment tonnage, but all of it in system cars. Under the defendant's rule, on the other hand, the mine owning the individual cars would receive them and would thereby be able to ship 200 tons of its total output capacity of 500 tons a day. The rating of this mine would then be reduced to 300 tons a day as against the rating of 500 tons assigned to the mine owning no private cars, the total reduced rating of the two mines being 800 tons. Instead of 700 tons the equipment remaining available for distribution would carry but 500 tons, of which the mine owning individual cars would get three-eighths, or 188 tons, making its total tonnage 388 tons, while the other mine would get five-eighths, or system cars of a capacity of 312 tons, an ad-

vantage of 76 tons enjoyed by the mine owning private cars in the distribution of all available equipment. That mine under the defendant's rule would therefore be able to ship out between 20 and 25 per cent more coal than its competitor, while under the rule approved by the Commission the shipments of the two mines would be the same under the facts assumed by the court in the case cited.

Referring to system fuel cars and foreign railway fuel cars assigned to a particular mine, the court in *Logan Coal Co. v. P. R. R. Co.*, supra, said, p. 503:

166 The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered: *United States ex rel. Coffman v. N. & W. Ry. Co.* (C. C.), 109 Fed. Rep., 831; *United States ex rel. Kingwood Coal Co. v. W. Va. & N. R. R. Co. et al.* (C. C.), 125 Fed., 252; *W. Va. & N. R. R. Co. et al. v. United States ex rel. Kingwood Coal Co.*, 134 Fed., 198, 67 C. C. A. 220; *United States ex rel. Greenbrier Coal & Coke Co. v. N. & W. Ry. Co.*, 143 Fed., 266, 74 C. C. A., 404; *State ex rel. v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St., 130, 23 N. E. 928; *United States ex rel. Pitcairn Coal Co. v. B. & O. R. R. Co. et al.*, 154 Fed. 108.

That is the general theory for the distribution of coal-car equipment that has appealed strongly to this Commission as being fair, reasonable, and nondiscriminatory. We recognize the right of a company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line also to do this; and each may send its cars to those mines to the exclusion of other mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all such cars must be counted against the distributive share of the mine receiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States in the cases just decided and announced (supra) the position of the Commission in this matter was not found objectionable either on legal or constitutional grounds. And as the exhaustive arguments and our further consideration of the same questions in these proceedings have not given us any new light or led us to any different conclusions, the

167 rulings in the previous cases must control the disposition of the complaints in this group of cases so far as they may be pertinent.

Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal-car equipment, including system fuel cars, foreign railway fuel cars, and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination. In this connection an important disclosure is made in a letter of record here, addressed to the president of the Clark Brothers Coal Mining Company under date of March 8, 1907, by the general superintendent of coal transportation of the

defendant company. It is there stated that the distribution of coal cars on the lines of the defendant on that date was as follows:

	Per cent.
System cars for company coal.....	21
Foreign cars for supply coal.....	6
Individual cars	45
System cars for commercial coal.....	25
Foreign cars for commercial coal.....	3
Total.....	100

This condition of affairs emphasizes the inequity of a system of distribution that first deducts from the rated capacity of a mine the tonnage represented by the capacity of the cars specially assigned to it and then uses the remainder as a new basis for determining the proportion of unassigned cars that the mine is to have. The figures above given show that 72 per cent of all the cars available on the lines of the defendant on the date mentioned were assigned cars, and but 28 per cent were unassigned cars. Manifestly such a basis of distribution can have but one tendency, and that is, 168 not only to steadily increase the physical capacity of the mines that regularly receive this large percentage of assigned cars, but also steadily to increase their commercial capacity, an advantage which the mines having the benefit of no assigned cars obviously can not enjoy. With such a large percentage of assigned cars it can not be doubted that the equipment furnished to some of these mines was sufficient to approximate their ratings, while the small percentage of unassigned cars makes it equally clear that the mines having no other cars must have fallen substantially short of their ratings.

We further find that the continuance of that system of distribution for the future would be unlawful on the same grounds. Although the mine owning private cars or to which company or foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal-car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them. It is scarcely necessary to add that the complainant's second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, "all cars adapted to and used for carrying bituminous coal," whether company fuel cars, foreign railway fuel cars, or private cars, must be denied.

* * * * *

169

Order.

At a General Sessions of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 7th Day of March, A. D. 1910.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Commissioners.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign 170 railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainant in this proceeding in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

171

(*Copy of Defendant's Exhibit No. 8.*)

"Interstate Commerce Commission,
Washington.

"I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the Report and Order of the Commission entered July 11, 1907, in case No. 1008, Railroad Commission of Ohio and others against Hocking Valley Railway Company, the original of which is now on file and of record in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 7th day of November, 1912.

[Seal of Interstate Commerce Commission.]

JOHN H. MARBLE, *Secretary.*

Before the Interstate Commerce Commission.

No. 1008.

RAILROAD COMMISSION OF OHIO et al.

v.

HOCKING VALLEY RAILROAD COMPANY.

No. 1009.

RAILROAD COMMISSION OF OHIO et al.

v.

WHEELING & LAKE RAILROAD COMPANY.

Submitted June 29, 1907. Decided July 11, 1907.

172

W. H. Ellis, Attorney General of Ohio, H. B. Arnold,
R. J. Mauck and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan and W. N. Duncan
for defendants.

Report and Order of the Commission.

No. 1008.

THE RAILROAD COMMISSION OF OHIO et al.

v.

THE HOCKING VALLEY RAILWAY COMPANY.

No. 1009.

THE RAILROAD COMMISSION OF OHIO et al.

v.

THE WHEELING & LAKE ERIE RAILROAD COMPANY.

Submitted June 29, 1907. Decided July 11, 1907.

Defendants are engaged principally in transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines upon the lines of defendants and send their own cars upon the lines of defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased, or so called "private" cars, devoted exclusively to the use of such lessees. During

173 a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or "private" cars are excluded from consideration and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars allotted to such mines in the proportionate distribution. Complaint alleges unjust discrimination against other coal operators along the lines of defendants in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or "private" cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and marketing of coal.

Held, That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such private and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of "private" and foreign railway fuel cars so delivered to it is less than its distributive share of the available

cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars.

- 174 W. H. Ellis, Attorney General of Ohio, H. B. Arnold, R. J. Mauck and S. W. Bennett for complainants.
J. H. Hoyt, Doyle & Lewis, H. M. McKeehan and W. N. Duncan for defendants.

Report and Order of the Commission.

CLARK, Commissioner:

The complaints in both of these cases were brought by the Railroad Commission of Ohio and the individual members of that body. The Attorney General of the State appeared for the complainants. Although a separate record was made in each case, both were heard at the same time and argued together. The decision of the Commission is therefore included in one report.

The basis of both complaints is that the owners and operators of coal mines along the lines of the defendants engaged in shipping coal to other States are unjustly discriminated against in the distribution of cars, although there are two features, one peculiar to each case, as follows:

In the complaint against the Hocking Valley Railway Company, it is alleged that it owns a large percentage of the stock of the Sunday Creek Company, owning and operating mines in Ohio and West Virginia, on the lines of the Hocking Valley and of the Kanawha & Michigan Railway companies, and that while it has not adequate equipment of its own, it has loaned, leased, and furnished cars to the latter company.

In the complaint against the Wheeling & Lake Erie Railroad Company, it is stated that certain so-called "private" cars, claimed to have been purchased by the Massillon Coal Mining Company and the Wheeling and Lake Erie Coal Mining Company, are not included in or charged against the percentages in distribution of cars to coal mining companies.

- 175 Paragraph III of the complaints is identical in that it alleges that defendants unjustly discriminate against the owners and operators along their lines of railway engaged in shipping coal by not considering "foreign railway fuel cars" in the percentages or distributive number of cars according to ratings established by them based on the capacities of the mines.

"Foreign railway fuel cars" are cars sent onto the lines of defendants by other railway companies for the purpose of being loaded with fuel coal for the use of such other railway companies. The cars are consigned to certain coal companies with which the railroad companies so sending the cars have contracts for the furnishing of

fuel coal in connection with which it is stipulated that the railroad companies will furnish their cars for loading such fuel coal. These cars so consigned are, by the defendant companies, not taken into account in the distribution of available cars among the several mines and operations along their lines.

The defendants, from time to time, distribute the available cars to be loaded with coal according to certain ratings established and based upon the respective capacities of the mines.

The defendant, the Hocking Valley Railway Company, alleges that prior to the 1st of January, 1906, it did count in the distribution foreign railway fuel cars, but that the foreign railway companies so sending their cars upon defendant's line notified it that if it did not cease its method of counting such cars in the allotment of cars to the various mines, the sending of such foreign railway fuel cars would cease altogether or greatly diminish, and that because of that threat and because of the fact that competing roads were not at that time so counting such cars in distribution it ceased to count them; that on or about August 15, 1906, it learned that a majority of competing railroads in the State of Ohio counted foreign cars against the mines to which they were delivered, and then defendant again began so counting these cars in the allotment to the mines to which consigned and so continued until January 1, 1907, when the practice was again discontinued on renewal of the threat to discontinue or greatly diminish supply of cars so furnished.

In December, 1906, the Ohio Railroad Commission decided that a common carrier in Ohio could not be permitted to suffer freight cars to come upon its line for the use of a shipper located thereon except upon condition that such cars could be used by other shippers similarly situated. It issued an order in effect requiring the carriers to count and distribute in accordance with their ratings all of the available cars upon their lines regardless of ownership or purpose for which sent to those lines. The Sunday Creek Company, which owns a large number of coal mines in the Hocking district, petitioned the United States Circuit Court for the Southern District of Ohio, Eastern Division, for an order restraining the Ohio Railroad Commission from enforcing its order and the carriers from complying therewith. The application for such restraining order was concurred in by the carriers on the ground that the Railroad Commission's order would deprive them of property without due process of law, and was an interference with the movement of interstate commerce. The restraining order was granted and, at the time of hearing these complaints, was still in force.

It is to be noted that in that proceeding the Sunday Creek Company is suing the Hocking Valley Railway Company, which owns nearly all of the stock of the Sunday Creek Company and the Wheeling & Lake Erie Coal Company is suing the Wheeling & Lake Erie Railroad Company, which is the owner of one of the mines leased to and operated by the Wheeling and Lake Erie Coal Company. It cannot be held that such a proceeding fairly discloses the interests of the many other producers of coal or that such other producers would be concluded by determination of the interests involved in such intercorporate relations.

177 Since this case was argued the complications have been relieved by the Railroad Commission of the State of Ohio agreeing to revoke its order and an understanding being reached that thereupon the court would dismiss the cases.

In general, the basis of distribution of the system cars was not complained of as unreasonable or unfair. Evidence was given as to one instance in which a coal company had continued to draw cars in the allotment for one of its mines that had not been worked for about a year and the track to which had been torn up and the tipple of which had gone into decay. It is not understood that any defense of such oversight or discrimination was offered.

The Hocking Valley Railway Company shows that it owns and controls 11,000 coal cars and that for the last ten years it has owned and controlled from 8,000 to 11,000 such cars. During a substantial portion of the year it has a large number of idle cars; for the greater portion of the year it is able to provide all the cars needed, but for four or five months in the year it is unable to meet the maximum demand of shippers of coal. It admits that it furnishes cars for use upon the lines of the Kanawha & Michigan Railway Company, which is a direct connecting carrier and which has a large traffic in coal, coke, lumber, and other commodities; and shows that on account of the inability of the Kanawha & Michigan Railway Company to obtain necessary equipment with which to do its business, the Hocking Valley Railway Company sold to the Kanawha & Michigan 2,500 of its cars, but that, at the same time and before delivering these cars to the Kanawha & Michigan, it purchased and put upon its own lines 3,020 new cars. As before stated favoritism in the sending of the Hocking Valley Railway's cars to the K. & M. road is alleged, on the ground that many mines of the Sunday Creek Company are located on the lines of the K. & M. road and the stock of the Sunday Creek Company is largely owned by the Hocking Valley Railway Company. The testimony does not, however, establish any favoritism toward that company in so

178 sending cars to the K. & M. road. The testimony was that the distribution to the K. & M. was made on the basis of supply and demand, and that if the supply was short on the Hocking Valley the K. & M. was cut proportionately. The K. & M. is in substance and effect a part of the Hocking Valley system. In its annual report to this Commission the K. & M. states it is subsidiary to and controlled by the Hocking Valley system through ownership of capital stock. The question of ownership by the Hocking Valley Railway Company of the Sunday Creek Company is not in issue in this proceeding beyond the question of whether the Hocking Valley Company discriminates in favor of the Sunday Creek Company in the distribution of cars.

The defendant, the Wheeling & Lake Erie Railroad Company, owns 11,400 cars. The basis of its system of distribution of cars among the mines is the tonnage rating of the mine. It states that cars on its line are divided into three classes:

"(a) System cars, which includes cars owned by the defendant,

or such as may be on its line of railroad and not owned by some specific shipper or restricted as to use.

(b) Foreign railway fuel cars, which include cars of foreign railroads specifically consigned to certain operators to be loaded by the operators with coal for the use of such foreign railroad in the operation of its railroad.

(c) Private cars, which include cars owned or leased or subject to the exclusive control of particular persons or corporations."

It admits that the "system" cars included in class (a) are distributed among the coal operators in proportion to their immediate requirements based upon the tonnage rating of their mines, but that in making such distribution foreign railway fuel cars and private cars are not counted. It also alleges that if such foreign railway fuel cars were counted in the general distribution the supply of such cars would be cut off or greatly diminished.

In this case, the question of the distribution of 1,500 so-called private cars, which are held subject to the exclusive control of particular coal companies, is involved. These are the cars included in class (c) in the division of this carrier's cars above referred to. The method in which the defendant company acquired these cars and under which the coal companies obtained exclusive control of them is, in brief, as follows:

Arrangements were made for the purchase, through trustees, of the 1,500 cars in question. The Massillon Coal Mining Company and the Wheeling & Lake Erie Coal Mining Company advanced the initial payment of 15 per cent of the purchase price of the cars, aggregating about \$150,000. The cars were delivered to trustees, who, in turn, leased them to the coal companies for a period of fifteen years. The trustees then sold the cars to the Wheeling & Lake Erie Railroad Company subject to the leases and the Wheeling & Lake Erie Railroad Company issued first-lien car-trust equipment obligations for the remaining 85 per cent of the purchase price of the cars. It also issued second lien car-trust certificates payable contemporaneously with the above for the 15 per cent of the purchase price advanced by the coal companies, which second lien car-trust certificates were accepted by the coal companies in return for their cash payments, and, by mutual agreement between the Wheeling & Lake Erie Railroad Company and the coal companies, the term of the leases for the exclusive use of these cars was reduced to ten years, subject only to the right of the railroad company to load the cars with traffic moving in the direction of the mines of the coal companies. Assuming, therefore, that the car-trust certificates will be paid as they mature, the unincumbered ownership of these cars will rest in the Wheeling & Lake Erie Railroad Company.

180 It is in evidence that this defendant company is willing to make similar arrangement with any other coal operator on its line who wishes to purchase cars thereunder. The defendant avers that it is without money or credit with which to purchase cars which it needs, and would be glad to have the use of cars acquired in the manner above described and subject to similar leases by coal companies operating on its line of road.

The testimony shows that the only interest which the Wheeling & Lake Erie Railroad Company has in any of the coal properties owned by the Massillon Coal Mining Company or the Wheeling & Lake Erie Coal mining Company is that a mine owned by the Wheeling & Lake Erie Railroad Company is leased to the Wheeling & Lake Erie Coal Mining Company.

It is intimated that as the lines of the Hocking Valley Railway, proper, are entirely within the State of Ohio there is some doubt as to the interstate character of its coal business and some question as to the jurisdiction of this Commission is suggested. The testimony shows, however, that the greater portion of its coal business is interstate, and defendant can not know when it transports empty cars to the mines for loading whether such cars will be loaded with intrastate or interstate traffic. Manifestly, it would be impossible to assign cars separately for the two kinds of traffic, and an effort to keep them separate in the movement of empties and of loads would involve endless work and expense. In the case of *Steamer Daniel Ball v. U. S.*, 10 Wallace, 557, Mr. Justice Field said:

"For whenever a commodity has begun to move as an article of trade from one State to another commerce in that commodity between the States has commenced."

In the case of the *Texas & Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S., 426, the court held—

181 "That a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable."

In that opinion it is stated:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.

* * * * *

"Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

What is one of the principal wrongs which the statute was intended to remedy? Certainly "any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" and section 15 of the act authorizes and empowers the Commission and makes it its duty, not alone to determine and prescribe "what will be the just and reasonable rate," but "what regulation or practice in respect to such trans-

portation is just, fair, and reasonable to be thereafter followed," and the carrier "shall conform to the regulation or practice so prescribed."

Therefore there seems to be no room for question, under the decision referred to, as to the original jurisdiction of this
182 Commission over alleged discriminatory practices on the part of carriers engaged in interstate commerce. It may be claimed that the decision in the above case is not decisive and conclusive on this point, yet every reason advanced by the Supreme Court in support of the conclusion that the lower court had not original jurisdiction in rate matters appears to apply with equal force to our view that this Commission has original jurisdiction of discriminatory practices prohibited by the act to regulate commerce.

It is suggested that the Commission has no power to regulate the distribution of cars, and in this connection reference is made to the Commission's decision in the case of *Mason v. C., R. I. & P. R. Co.*, 12 I. C. C. R., 70, in which the complaint was dismissed upon the statement being made that the Commission had no authority to fix rules and regulations governing reciprocal demurrage. Clearly the Commission has no jurisdiction to establish or fix in the first instance rules governing the conduct of the carrier's business or regulating its distribution of cars, but, as held in many decisions of the Commission, it has undoubted power and jurisdiction to deal with complaint that the practice of carriers work unjust discrimination against shippers or localities.

There is an analogy between the jurisdiction of the Commission and that of a court of equity.

In *Johnson Coal Mining Co. v. Hocking Valley Ry. Co.*, 14 Ohio Dec., 209, Judge Dillon said:

"A court of equity will not assume to dictate the policy or business management of a common carrier aside from its clear duty under its charter or the statutes. That function belongs exclusively to the company itself, and will not be interfered with because changes ought to be made as apparently reasonable, necessary or otherwise. But where the common carrier itself adopts as a part of its business policy any advantageous facility for handling
183 freight it must not discriminate in its use by the public, but must afford the facility equally to all, and to this extent equity will interfere by injunction to prevent such favored use thereof and compel its equal service to all."

Aside from the desire of foreign railways to provide a dependable and steady source of supply for fuel, they are able to purchase their fuel coal cheaper by furnishing cars in which to transport it, and their ability to purchase is enhanced if the cars which are sent for fuel supply are not counted in the distribution of cars. The demand for railway fuel and the opportunity of securing some degree of uniformity throughout the year in its coal output enables the coal operator who can take a contract of this nature and be assured of a supply of cars which are not to be counted against him in the distribution, to work his mines more economically, more nearly to their full capacity and more steadily. He can therefore afford to sell the

fuel cheaper than he would under different circumstances and has no doubt to some extent a corresponding advantage in the competitive markets for commercial coal. Obviously a railroad company would not send its cars on to the lines of another railway company, even for its own fuel supply, if they were to be diverted from the intended use and distributed among others than those to whom consigned and for loading with commercial coal to various destinations on the lines of other carriers. To do so would be to deprive itself of the use of its own equipment when most needed, would make its fuel supply wholly uncertain, and, through lack of equipment, would possibly deprive it of the opportunity of handling profitable business.

It therefore seems apparent that foreign railway fuel cars should not be diverted from the purpose for which they are sent, but should be delivered to the operator to whom consigned. It seems equally apparent that such operator should not be given the decided advantage of having, in addition, at a time when no operator can get all of the cars desired, his full percentage or proportion of 184 available system cars just as if he had not been furnished with any foreign railway fuel cars. Intercorporate relations between carriers and the coal companies served by them invite and lead to accusations of favoritism in these connections, which are not at issue in these cases.

In the case of the United States ex rel. Pitcairn Coal Company v. Baltimore & Ohio Railroad Company et al., in which the coal company sued for a writ of mandamus to require the Baltimore and Ohio Railroad Company to cease from subjecting it and other coal companies to undue and unreasonable discrimination in the shipping and transportation of coal, recently decided in the Circuit Court of the United States for the District of Maryland, practically the same questions were involved as are in these complaints, in that the railroad companies parties defendant, did not count the private cars, or the foreign railway fuel cars in the general distribution. In the decision of this case Judge Morris said:

"Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of his individual cars; on the contrary it is only just. But under the actual circumstances of the business of the coal trade on the Baltimore and Ohio Railroad, from which it is apparent that the great struggle of the mine operators is to get sufficient cars to ship their product during the winter months, and that their business existence depends upon it, it is not unreasonable to hold that the railroad shall do all that it is practicable to do to avoid subjecting the operators who do not have the use of individual cars to unreasonable disadvantage. While it is true that the existence in the trade of a larger number of individual cars does increase the total car equipment, and so far as the individual cars satisfy the requirements of their owners does increase the number of free-equipment cars which the railroad has at its disposal, it still is a fact that in times 185 of car shortage the demand is so great that all the mines having individual cars require and get their full percentage of the railroad equipment without reference to their own cars.

"Under the provisions of the interstate commerce act the railroad must abstain from giving any undue or unreasonable preference or advantage to any mine owner in any respect whatsoever.

"The duty of the railroad under section 1 is to furnish transportation upon reasonable request. It is not the duty of the shipper, but of the railroad, to provide the required vehicles of transportation. If for convenience or of necessity the vehicles are furnished by certain of its shippers, and are run regularly on the road just as its own equipment is run, they are, I think, to be treated for some purposes as part of the equipment of the road.

"The regularly run individual cars occupy the tracks and sidings, they are drawn by the locomotives and are operated by the employees of the railroad company and must lessen the facilities in that respect of the independent operators. Indeed an objection of the railroad company to individual ownership of cars is that they require special switching and special care to collect and classify them in order to haul them to their respective destinations. As the independent mine operators have in this manner to suffer from individual cars being transported as a part of the railroad's equipment in such large and constant numbers running regularly on the railroad's lines, it seems only reasonable that when distribution upon percentage is made, all this regular equipment then available should be taken into the calculation and not to first deduct the individual cars and give the independent mine operators only their percentage of the remaining available equipment. This taking of individual cars into calculation would not be depriving the individual car owner of the exclusive

186 use of his cars and it would not be depriving him of any contractual right which he is entitled to retain and enjoy under the interstate commerce act. The mine operator would in any state of the car supply, continue to get the exclusive use of his individual cars as before, but when the supply was short he would not get so many of the railroad's general equipment. It would be rectifying an unreasonable disadvantage which has been shown to work a serious hardship upon the relator and the independent mine operators in the Fairmont region.

* * * * *

"Under the ruling in the present case it becomes unimportant to inquire under just what contractual terms as between the railroad and the mine operators the individual cars are held. Some of these cars have been fully paid for by the railroad company by the working out of the mileage contracts under which they were placed on the road and are now the property of the railroad company, but the mine owners claim that under the contracts they are still entitled to their exclusive use. The exclusive use of other cars now belonging to the Baltimore and Ohio Railroad Company is claimed by virtue of an agreement made with the Monongahela River Railroad Company, the former owner. It is apparent with regard to the cars now the property of the Baltimore & Ohio Railroad Company that these contracts would require careful scrutiny if it was necessary to go into that matter, and it might become a question to what extent the provisions of the interstate commerce act would per-

mit these cars now the property of the railroad company to be taken out of its distributable car supply.

* * * * *

"My finding and ruling is that the relator is entitled to have allotted to it its percentage of all the available car supply equipment, whether of general or individual cars, and that the relator and those in like situation with it are subjected to an unreasonable disadvantage by getting only a percentage of the free
187 Baltimore and Ohio equipment, after having first eliminated therefrom the individual cars; but in no case are the owners of the individual cars or those entitled to them by contract to be deprived of the exclusive use of their individual cars, but the individual cars assigned by the owner to be loaded at specified mines should be charged against the specified mine as part of its pro rata distribution of cars."

As to foreign railway fuel cars, Judge Morris held that these cars were sent for a special purpose and could not be used for any other; that they were not available for commercial shipments, and that the coal so shipped is in a class different from the ordinary commercial shipments, and that therefore such foreign railway fuel cars should not be counted in the general distribution.

Note the difference between the case just referred to and that of the Logan Coal Company v. Pennsylvania Railroad Company, recently decided in the Circuit Court of the United States for the Eastern District of Pennsylvania. In this case the Pennsylvania Railroad Company was, and for some time had been, observing the following rule:

"Commencing January 1, 1906, assigned cars—i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars especially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading—will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all cars will be prorated."

In this it will be noted that the fuel cars, including those for its own fuel supply, and the private cars were counted in the distribution.

The Logan Coal Company sued out a writ of mandamus to require the Pennsylvania Railroad Company to dis-
188 continue the enforcement of that rule and to assign all specially consigned fuel cars and private cars arbitrarily, giving them to the mines to which such cars were consigned, in addition to their full quota of system cars. In deciding the case, Judge Holland said:

"All other obligations laid upon transportation and railroad companies engaged in interstate commerce must be performed consistently with this paramount requirement of equal treatment to all.
* * * It must accept the individual cars in connection with its own, so that all shippers of bituminous coal along its route will receive the same treatment and enjoy the same facilities for the transportation of their produce as any other, and when a practice

which has been followed is found to work unjustly, and to the disadvantage of one shipper in favor of another, under the broad and peremptory terms of the commerce act it is the duty of the common carrier to so alter and adjust the practice that the discrimination effected against the shippers will be eliminated.

* * * * *

"The relator under the order receives a slight advantage, as shown in the above illustration, over its competitors in that it receives a pro rata of the defendant's cars upon a basis calculated on the difference between its rated capacity of the mine and the capacity of all its individual cars. As has been shown this enables the relator to ship somewhat more of its daily output than a competitor who only receives the use of company cars. * * * It is true the defendant company is required to furnish sufficient facilities at all times to transport the merchandise of shippers along its route, but it occurs, in the bituminous coal mining industry in certain of the winter months of the year, that the extraordinary demand for bituminous coal is far beyond the car capacity of the railroad company to transport, and it is conceded that the railroad company is not

189 required to keep a car equipment sufficiently extensive to furnish car facilities to bituminous coal shippers to meet a demand adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year. This, however, it appears the operators are unable to do, and it seems to me that when an operator elects to avail himself of his right under the laws of Pennsylvania to place individual cars upon the company's tracks, he must do so subject to such rules and regulations adopted by the railway company as will work out a result in accord with the requirements of the laws of the State of Pennsylvania and the provisions of the interstate commerce act requiring equal facilities for all.

"The relator is not in any sense discriminated against. First, it has the use of its own cars and its share of company cars upon a basis which gives it a certain advantage over its competitors, and in addition, it receives a certain compensation from the railroad company for its cars. They are placed upon the tracks of the defendant company, and the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment, in order that the defendant company may be enabled to treat all shippers the same and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its line, upon a basis fixed upon the rated capacity of the mine as ascertained by the method adopted by the railway company. * * *

"What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment

of these cars by the order of January 1, 1906, in no way that
190 we can see unduly or unreasonably discriminated against the
relator." * * *

It will thus be seen that the conclusions reached by the Circuit Court of the United States for the District of Maryland and the Circuit Court of the United States for the Eastern District of Pennsylvania as to the propriety of counting the foreign railway fuel cars in the distribution of equipment are diametrically opposed. With the highest respect for the views of the court in the district of Maryland, we are of the opinion that the conclusions reached by the court for the eastern district of Pennsylvania are in accordance with the spirit of the act to regulate commerce and appear to be supported by the great weight of authority on the subject.

On page 68, of Report on Discriminations and Monopolies in Coal and Oil, the Commission said:

"This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed."

In the same report, page 81, is incorporated the following recommendation:

"Third. That after reasonable time carriers engaged in interstate commerce be prohibited from using "individual" or "private cars" for the handling of coal traffic; and further, that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road, excepting individual or privately owned cars until their use is prohibited, be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time."

191 It is to be noted that the recommendation of the Commission refers to "private" or "individual" cars in fact; not to cars which are private in name only.

We are of the opinion that the practice of these defendants in failing or refusing to make any account of foreign railway fuel cars in the distribution of cars among the operators is discriminatory and should be discontinued. We are equally of the opinion that a distribution of these specially consigned foreign railway fuel cars among operators, to be used for purposes for which they were not intended, as seems to have been contemplated in the order of the Ohio Railroad Commission, would be unwarranted and unfair. The total of the foreign railway fuel cars, the private cars and the system cars should be taken into consideration in determining the distribution. If the number of foreign railway fuel cars or of private cars is less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it and all of the private or leased cars belonging to it, and a sufficient number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available

system cars should be divided among the other operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned, and delivered.

As before stated, at one time the defendant—the Hocking Valley Railway Company—did count foreign railway fuel cars in the distribution, and it discontinued this practice because of the threat that if it continued so to do the supply of such cars would be cut off or materially reduced. Consignor may not impose conditions

192 which require carriers to indulge in unjust discrimination. Consignor may impose conditions as to the use of its own cars and may insist that its consignment orders with relation thereto shall be observed. It may not dictate as to the manner of distribution of the system cars of a carrier. The only interest consigning road can have in whether or not its cars are counted is the effect it may have upon the price it may have to pay for the coal.

It is also shown that the Hocking Valley Railway Company was influenced to discontinue counting these cars in the assignment, because it found that competitors were not counting them. When this question is definitely settled all will follow the same principle and all be on an equality, and the effect cannot be prejudicial to the interests of one as against all. It does not seem that the supply of fuel cars will be either increased or diminished, except as the actual needs of the carriers furnishing such cars may affect the supply.

This Commission is not in this case required to pass upon the transactions involved in the purchase and lease of the 1,500 private cars.

In *Rice, Robinson & Witherop v. W. N. Y. & P. R. Co.*, 4 I. C. C. Rep., 149, it is stated:

"It is not the business of the shipper to furnish the vehicle of transportation. This is the duty of the carrier. Under its franchise the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates."

193 It is submitted that the cars so held under lease are devoted to the exclusive use of the company holding the lease and that they are not counted against such company in the distribution of the available cars. The question is: Is such failure to count these cars an unjust discrimination against other coal mine operators on the line of defendant company, the Wheeling & Lake Erie Railroad Company? This question we are constrained to answer in the affirmative. The only consideration which these coal companies have paid for the leases in question is the advancement of \$150,000. in cash, for which, in a comparatively short period, they received an equivalent amount of interest bearing car trust certificates. Assuming that these leases are valid, we are of the

opinion that it is a discrimination against other coal operators to give the lessees their full proportion of the available system cars just as if they did not have the use of the so-called private cars. There is always possibility that discrimination may be intensified or aggravated by conditions arising or occurring under which the carrier will be unable, because of insufficient power or inadequate terminals to promptly and efficiently transport all of the tonnage offering. We are of the opinion that the so-called private cars herein referred to should be counted and considered in the distribution of equipment in the same manner as hereinbefore provided for foreign railway fuel cars; that is, the lessees of these cars should be given full and exclusive use of them, but should not be given a division of the system cars except when the supply of the so-called private cars and of foreign railway fuel cars assigned to them is less than their proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars.

An order will be entered accordingly.

194

Order.

Upon the foregoing report—

It is ordered, That the defendants, the Hocking Valley Railway Company and the Wheeling & Lake Erie Railroad Company, be, and they severally are hereby, notified and required, on or before the 15th day of September, 1907, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars or of leased or so-called private cars in the distribution of coal cars for interstate shipments of coal among the various coal operators along their lines.

It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 15th day of September, 1907, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, and leased or so-called private cars in determining the distribution of coal cars among the various coal operators along their lines on interstate shipments of coal and if the number of foreign railway fuel cars or leased or so-called private cars, or both, is less than the percentage or proportion of the company to which such cars are consigned or leased, then that company must be given all the foreign fuel cars consigned to it and all the cars owned or leased by it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it and the leased so-called private cars delivered to it is greater than its proportion, all such cars so consigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway

fuel cars must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars."

195

(Copy of Defendant's Exhibit No. 9.)

Order.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 13th Day of April, A. D. 1908.

Present:

Martin A. Knapp,
Judson S. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Commissioners.

No. 1294.

GLENN W. TRAER, Receiver of the Illinois Collieries Company,
v.
CHICAGO & ALTON RAILROAD COMPANY.

No. 1295.

SAME

v.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY OF ILLINOIS.

No. 1317.

SAME

v.
ILLINOIS CENTRAL RAILROAD COMPANY.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company of Illinois, and the Illinois Central Railroad Company, be, and they

severally are hereby, notified and required, on or before the 1st day of July, 1908, to cease and desist, during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars in the distribution of coal cars for, or affecting interstate shipments of coal among the various coal operators along their lines.

196 It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 1st day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars."

197

DEFENDANT'S EXHIBIT No. 10.

Order.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 2nd Day of June, A. D. 1908.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Commissioners.

No. 1322.

RAIL & RIVER COAL COMPANY

v.

BALTIMORE & OHIO RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendant, the Baltimore & Ohio Railroad Company, be, and it is hereby, notified and required, on or before the 1st day of August, 1908; to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing, with respect to interstate shipments of coal, the present practice or regulation of failing or refusing, in times of coal car shortage, to count railway fuel cars and leased or so-called private coal cars against the distributive share of available system coal cars which the coal operators, to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned, are entitled to according to the rating of their respective mines.

It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before said 1st day of August, 1908, and during a period of at least two years thereafter to maintain and enforce, with respect to interstate shipments of coal, a practice or regulation which, in times of coal-car shortage, shall require foreign railway fuel cars and leased or so-called private cars to be counted against the distributive shares of available cars to which the respective operators, to whom the leased or so-called private cars belong or foreign railway fuel cars are consigned, are entitled

according to the respective ratings of their mines; and that the said leased or so-called private cars shall always be delivered to the operators owning them and the said foreign railway fuel cars shall always be delivered to the operators to whom they are consigned by said foreign railway; and that in case said leased or so-called private cars or foreign railway fuel cars so delivered to the operator owning them or to whom they have been consigned are not sufficient in number to fill out his distributive share of available system cars, enough system cars are to be added to make up his share according to the rating of his mine as fixed and determined by the system of mine rating on the lines of the defendant.

199

C. P., Clearfield County.

No. 148, December Term, 1911.

CLARK BROTHERS COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY.

Defendant's Points.

* * * * *

Assignment of Error No. 12.

["3. The evidence has established that the bituminous coal transported by the defendant during the period of the action was transported from mines located in the State of Pennsylvania to points both within and without the State; that in making distribution of its coal cars among shippers of such coal during the period
200 of the action, the defendant did not make one distribution of cars intended for shipments to points within the State and another one of cars intended for shipments to points without the State, but made but one distribution, leaving the shippers at liberty to use the cars for shipments to points either within or without the State as they might elect. Under these circumstances, the defendant, in respect to the distribution made, was subject to the obligations and prohibitions imposed upon it by the said Acts of Congress, known as the 'Interstate Commerce Acts,' and to these exclusively, and as action for non-observance of obligations or of prohibitions imposed by or embodied in these Acts are cognizable exclusively either by the Interstate Commerce Commission or by the Courts of the United States, there can be no recovery in this action by the plaintiff of the discrimination complained of."]

Refused. (This point was not read to the jury.)

Assignment of Error No. 13.

["4. The evidence has established that prior to the institution of this action the Interstate Commerce Commission of the United States, acting under and pursuant to the authority conferred upon, and vested in, it by the Acts of Congress, known as the 'Interstate

Commerce Acts,' defined and prescribed the method or system of car distribution which should have been observed and followed by the defendant in this action during the period thereof. As the result of such action by the said Commission, and of the orders previously made by the Commission, which have been given in evidence, defining and prescribing the method of car distribution which the said Interstate Commerce Act enjoined upon carriers subject to its provisions, this Court is without jurisdiction to entertain the present action, in so far as it is rested upon the discrimination complained of by the plaintiff, and the plaintiff consequently is not entitled to recover on this ground."]

Refused. (This point was not read to the jury.)

201

Assignment of Error No. 14.

["5. The evidence has established that prior to the institution of the present action, to wit, on or about the 5th day of June, 1907, the plaintiff in this action instituted a proceeding against the defendant in this action before the Interstate Commerce Commission of the United States for the purpose of obtaining, inter alia, an award in its favor covering the damages which it complained it had sustained because of the failure of the defendant to properly rate its mines, Falcon Nos. 2, 3 and 4, and to give to them the number of cars which it claimed should have been delivered at these mines if a proper system or method of distributing its cars had been pursued by the defendant, and because of the inadequacy of the defendant's equipment during the period of the present action; that the said proceeding eventuated in two reports and orders promulgated by the said Interstate Commerce Commission on March 7, 1910, and March 11, 1912, respectively, the latter of which made an award of damages in favor of the plaintiff in the said proceeding, being the plaintiff in this action, and against the defendant in said proceeding, being the defendant in this action, covering the loss which the Commission found the plaintiff had sustained because of the failure of the defendant to give to the said Falcon Mines Nos. 2, 3 and 4, the cars which the Commission found should have been delivered to them, and which would have been used for interstate shipments. Such proceeding and the award of the Commission made therein preclude the plaintiff from maintaining the present action, in so far as it relates to Falcon Mines Nos. 2, 3 and 4, and from recovering herein the loss, if any, which it sustained because of the failure of the defendant to give to the said mines more cars than were delivered at the said mines during the period of the action."]

Refused, reserving the legal propositions involved therein. (This point was not read to the jury.)

202

Assignment of Error No. 15.

["6. It appears that in the proceeding instituted before the Interstate Commerce Commission by the plaintiff against the defendant the award made in favor of the plaintiff was based upon and covered

the loss which the Commission found the plaintiff had sustained due to the greater cost of producing all the *the* coal mined in the period of this action at Falcon Mines Nos. 2, 3 and 4, because of the failure of the defendant to place a larger number of cars at the mines named than were actually delivered to them. The plaintiff cannot, therefore, in the present action recover the amount of such increased cost."]

Refused, reserving the legal propositions involved therein. (This point was not read to the jury.)

Assignment of Error No. 16.

["7. The plaintiff cannot recover in this action the damage or loss, if any, sustained as the result of its failure to receive from the defendant cars which would have been used for shipments to points without the State of Pennsylvania. Cars which would have been consigned by the plaintiff to purchasers at destinations outside the State would have been so used, even though the coal loaded therein was sold under contracts providing for delivery to such purchasers f. o. b. cars at the plaintiff's mines."]

Refused. (This point was not read to the jury.)

* * * * *

Assignment of Error No. 18.

["9. The evidence has established that the Interstate Commerce Commission has determined that the system or method of ratings pursued by the defendant during the period of the action was a proper and lawful one, and subjected the plaintiff and other shippers to no discrimination or disadvantage, and that the ratings actually given to the plaintiff's mines were fair and proper. This determination by the Commission is binding and conclusive, and the plaintiff cannot, therefore, recover in the present action because of the ratings actually given to their mines."]

Refused, for the reason that while the system or method of rating adopted by the defendant company may have been sanctioned by the Interstate Commerce Commission, the question here was as to whether or not there was discrimination practiced against the plaintiff even under that system or method of rating.]

* * * * *

Assignment of Error No. 19.

["11. There is no evidence which would warrant the jury in finding that the plaintiff was subjected to any unlawful discrimination because of the ratings given to its mines during the period of the action by the defendant."]

Refused, for the reason that there is some evidence tending to show an unlawful and unfair discrimination because of the ratings in comparison with the mines of other shippers.]

* * * * *

204 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

VII. Verdict of the Jury and the Judgment Thereon.

And now to wit: This 25th day of Nov., 1912, we, the Jurors empaneled in the above entitled case, find A verdict against defendant of discrimination, and damage in favor of plaintiff for the sum of Forty one thousand four hundred eighty-one (41481) dollars, this sum to be trebled as per act of legislature. Total \$124,443.

(Signed) T. J. McCAUSLAND, *Foreman.*

Judgment was subsequently entered for the full amount of said verdict.

205 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Motion in Arrest of Judgment and for New Trial.

Now November 29, 1912, Defendant Company moves in arrest of judgment and for a new trial for the following reasons:

First. The Court erred in the admission and rejection of evidence.

Second. The Court erred in the general charge to the jury and in answer to points of Plaintiff and Defendant.

Third. The verdict of the jury is against the weight of evidence.

Fourth. The verdict of the jury is contrary to the law applicable to this case.

Fifth. And for other errors and irregularities in the case.

MURRAY & O'LAUGHLIN,
Attorneys for Defendant Company.

Now November 29, 1912, service hereof accepted and granting issuance and service of rule waived.

A. M. LIVERIGHT,
A. L. COLE,
Att'ys for Pl'ff.

Filed Nov. 29, 1912. John H. Moore, Prothonotary.

206 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Motion for Judgment N. O. V.

Now November 29, 1912, Defendant Company moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and for judgment non obstante veredicto upon the whole record.

MURRAY & O'LAUGHLIN,
Attorneys for Defendant Company.

Now November 29, 1912, service hereof accepted and granting issuance and service of rule waived.

A. M. LIVERIGHT,
A. L. COLE,
Att'ys for Pl'ff.

Filed Nov. 29, 1912. John H. Moore, Prothonotary.

207 C. P., Clearfield County, December Term, 1911.

No. 148.

CLARK BROTHERS COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Motion in Arrest of Judgment and for New Trial.

Sur Motion for Judgment non Obstante Veredicto.

Opinion.

In this case the plaintiff company, a corporation chartered under the laws of the State of Pennsylvania, sued the defendant Company, also a Pennsylvania corporation, to recover compensation for alleged acts of discrimination under the Pennsylvania Act of 1883, permitting treble damages to be recovered in such cases. The case was tried at a special term fixed for that purpose in November, 208 1912, and on the 25th day of November a verdict was returned by a jury finding single damages in the sum of \$41,481.00, and also finding that there was discrimination practiced of such a character that it was entitled to recover treble damages under the Act in such case made and provided and therefore entitling it to a verdict in the sum of \$124,443.00.

The two motions to be considered at this time raise a number of questions. The principal question argued and to be considered in this opinion is that of jurisdiction of this Court to entertain the action at all. The proofs offered and the verdict of the jury for the purposes of this consideration may be said to establish the following facts:

First. That the defendant Company, a common carrier, did practice unlawful discrimination against the plaintiff corporation in the matter of furnishing cars to its several mines, Falcons Nos. 2, 3 and 4 in Clearfield County and Falcons Nos. 5 and 6 in Indiana County.

Second. That for the period sued for, namely, between October, 1905, and April 30th, 1907, inclusive (excepting as to four months of 1906 during which a strike prevailed in the coal region), the plaintiff Company suffered damages at the hands of the defendant Company, assessed by the jury at the sum of \$41,481.00.

Third. According to the proofs offered the unlawful discrimination practiced by the defendant Company, a common carrier, was that of failure to furnish a fair and equal pro rata distribution of cars to the several mines of the plaintiff Company.

Fourth. That according to the proofs offered and not in dispute, 95 to 98 per cent. of the coal sold by the plaintiff Company was sold f. o. b. cars at the mines, and the claim as made, so far as it relates to coal unmined and not shipped because of the alleged discrimination, was based on a like percentage or that practically all of
209 the coal so unmined and shipped would have been sold f. o. b. cars at the mines.

Fifth. That according to the proofs offered and not in dispute, the plaintiff Company did make complaint before the Interstate Commerce Commission against the defendant corporation, alleging an unfair rule of distribution and alleging actual discrimination against it as to its Falcon mines Nos. 2, 3 and 4 in Clearfield County, in favor of other shippers of bituminous coal in the region, which complaint was begun by a proceeding filed some time in 1907, after the period of action in this suit, and docketed in the proceedings of the Interstate Commerce Commission as to No. 1111, as appears by defendant's Exhibit No. 3 in the testimony of this case. That said complaint was so proceeded in, as appears by defendant's Exhibit No. 5, that the same was submitted January 30th, 1909, and decided March 7th, 1910, at which time the said Interstate Commerce Commission filed an order in said case as follows:

"The cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as 'assigned cars,' from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as

the rated capacity of that mine in the distribution of all 'unassigned' cars:

210 "It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

"It is further ordered, That the defendant be, and it is hereby, notified and required, on or before the 1st day of Nov. 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

"And it is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

Sixth. That the same matter with respect to the reparation in award of damages was submitted April 20, 1911, and decided March 11, 1912, as appears from defendant's Exhibit No. 4, with the result that as to the said damages due to plaintiff Company the following order was made:

"This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report
211 herein on March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

"It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of \$31,127.96, with interest thereon at the rate of 6 per cent per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the commission."

On the general question of jurisdiction of this Court, it is conceded by the learned Counsel for the defendant that we are bound by the decision of the Supreme Court of the State of Pennsylvania in the case of the Puritan Coal Mining Company against the Pennsylvania Railroad Company, recently decided, and which will be reported, as shown by the Advance Reports, in 237 Pa. St. 420.

It is contended, however, on behalf of the defendant, that because of a series of proceedings before the Interstate Commerce Commis-

sion, in a number of cases brought by parties before said Commission, including the plaintiff Company in this case, for the adjustment of certain alleged matters of car distribution and alleged discrimination, and against a number of railroads therein named, and which appear in the testimony in this case as Defendant's Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, and 10, this case is differentiated in the facts constituting a defense from the case of the Puritan Coal Mining Company, *supra*. Not to go into detail with respect to these several orders of the Interstate Commerce Commission, it is sufficient for the

purposes of this case, as we believe, to say that none of the said orders of the Interstate Commerce Commission are shown

212 to antedate the period of the action in this case, the earliest being that of the Hocking Valley Railway Company (Defendant's Exhibit No. 8) decided July 11, 1907. Generally speaking, it is contended on behalf of the defendant Company that the existence of these orders, especially that with reference to the Pennsylvania Railroad, decided in 1910, indicates that the Interstate Commerce Commission have occupied the field and thereby ousted the jurisdiction of all State courts with reference to the subject matter therein passed upon. We, however, do not take the same view with respect to the decision of the Puritan Coal Mining Company case. We believe the decision of the Supreme Court in that case must be considered as having been decided with full knowledge of the fact that the Interstate Commerce Commission had, in special cases brought to their attention, promulgated certain rules and orders controlling future car distribution; that is, distribution; made subsequent to the date of the orders of the Interstate Commerce Commission. The proof of this is that one of the cases cited by Mr. Justice Stewart, in his opinion, is that of Illinois Central Railroad Company vs. Interstate Commerce Commission, 215 U. S. 481, which case especially involved an interstate Commerce Commission order of distribution. In the Puritan case Mr. Justice Stewart, after quoting from decisions of the Supreme Court of the United States, thus summarizes: "We derive from this opinion these inevitable conclusions: (1) that where Congress prescribed a particular act, not in itself an offense at common law, jurisdiction with relation thereto attaches to the Federal Courts; (2) where the act is an offense at common law, and made so as well by State statute, in such case, except as other reasons may be shown, there is concurrent jurisdiction of it in the State courts; (3) that the Interstate Commerce Act does not attempt any more than does the common law to define what

particular acts shall constitute unlawful discrimination, but

213 commits that to the Interstate Commerce Commission; (4)

that when this Commission has by its orders declared any particular practice or regulation observed by an interstate corporation as unreasonably discriminating, it is as though Congress has especially legislated with respect thereto, and such circumstance draws exclusive jurisdiction of the offence to the Federal tribunal; (5) that except as to the thing the Commission had defined and denounced as undue discrimination, the discrimination complained of may be adjudged by the State courts according to their own

statute, or the common law as the case may be." The learned Justice then proceeds to show how the Commission has exercised its jurisdiction, especially citing the case of Illinois Central Railroad Company vs. Interstate Commerce Commission, *supra*, as an illustration of an adjudication which formulated general rules for the observance of all railroads; and holding in opinion that the regulation therein announced "is as much the law of the land as though written in the lines of the Interstate Commerce Act and that having been legislated upon by the Commission exclusive jurisdiction with respect thereto vests in the Federal tribunal." In distinguishing the Puritan case the learned Justice then says: "Here it is not complained that defendant had disregarded any order of the Commission; nor has any order of the Commission even remotely regulating the subject of the complaint here been shown. What is complained of is that the defendant having voluntarily adopted a system for the distribution of its cars which it must have regarded as just and equitable, and from which it makes no claim to be released, openly and flagrantly disregarded it by daily distributing to the Berwind-White Coal Company a much larger number of cars than its rating called for, while furnishing complainant with less than it was entitled to under its rating. The grouping of plaintiff's mines in a class

with others for purposes of service; the determination of the
214 total number of cars to be devoted to such service; the ratings of the several mines within the group and the pro rata of distribution, were not matters regulated by the order of the Commission, but matters decided upon by the defendant company with a view to avoid prejudice to the shipper. Had the plaintiff been dissatisfied with the regulation it could have appealed to the Commission to correct it; had its appeal been sustained and followed by an order of amendment or correction of the regulation, then, upon subsequent disregard of the regulation as amended, plaintiff's only forum for relief would have been the Federal Court, since in that case again Congress would have taken possession of the field. But there is nothing of that kind here; nothing but a case of discrimination pure and simple; not a specific offence created by the express terms of the Federal statute, not an offence against any order of the Commerce Commission, but an offence which could fall within the Federal statute and the common law as well, and so be held to have been legislated upon by Congress, only as the Interstate Commerce Commission has so declared. Our own State statute rests for its authority on the police power of the State, and its sole object is to prohibit common carriers which derive all their powers from the state, and have been granted these to the end that they may serve public necessity and convenience, from practicing undue and unreasonable discrimination between shippers in the service they are created to render. The exercise of this power in the way indicated is not interfered with by the Interstate Commerce Act in the absence of action by the Commerce Commission specifically directed against the particular matter complained of. The thing condemned by our State statute and by the common law was a purely incidental matter indirectly affecting interstate commerce, just as was the discrimination in the case of the Missouri Pacific Ry. v. Larabee Mills,

215 *supra*, (211 U. S. 612). The two cases on principle cannot be distinguished, and we but follow the plain guidance of that case in holding that the power of the State with respect to the subject matter of the present controversy remains undisturbed. It was not a question in the case whether the cars denied the plaintiff were intended for shipment within the State or beyond. It was sufficient that the offence was committed within the State."

The above quotation from the *Puritan* case is equally applicable to the facts in this case. The offense alleged here is that of discrimination pure and simple. No specific offense created by the express terms of the Federal statute is alleged to have been violated. Neither is any offense against any order of the Commerce Commission set up as the basis of recovery. The period sued for between October, 1905, and April 30, 1907, antedates all general rules, regulations or orders of the Interstate Commerce Commission which could by any construction be said to be applicable to the case in hand. We are clear, therefore, that the general proposition of a want of jurisdiction in the State court is not sustainable.

Now it is contended by the defendant's Counsel, especially as to this case, that the plaintiff having filed its complaint with the Interstate Commerce Commission and having had not only a ruling or order defining that the practice of the defendant Company was discriminatory, but having also so proceeded before the Interstate Commerce Commission as that an award of damages had been made in favor of the plaintiff, it is barred from proceeding in this action. The learned Counsel for defendant base their argument for this position on the opinion of Mr. Justice Stewart in the *Puritan* case, in which he subdivides his conclusions as to jurisdiction, and under the clauses 4 and 5 of said conclusions, which are as follows: "(4) that when this Commission has by its orders declared any particular practice or regulation observed by an interstate corporation as unreasonably discriminating, it is as though Congress had specially legislated with respect thereto, and such circumstance draws exclusive jurisdiction of the offence to the Federal tribunal; (5) that except as to the thing the Commission has defined and denounced as undue discrimination, the discrimination complained of may be adjudged by the State courts according to their own statutes, or the common law as the case may be." Counsel, hence, argues that this plaintiff, by its complaint as to the method and rule of distribution, recognized and subjected itself to the jurisdiction of the Interstate Commerce Commission so as to draw exclusive jurisdiction to the Federal tribunals. It contends further that the complainant in the Interstate Commerce case and the plaintiff in this case is obliged to proceed on its award, as pointed out by Sections 8, 9 and 16 of the Interstate Commerce Act. In other words, the contention is, that the action of the plaintiff in thus resorting to the procedure prescribed by the Interstate Commerce Act in the cases of violations by carriers of the provisions of that Act, subjected this controversy to the exclusive jurisdiction of the Interstate Commerce Commission and by so doing rendered applicable to the situation the effective provisions of the Interstate Commerce

Act. That, therefore, the Federal legislation is applicable, even under the principles laid down by Mr. Justice Stewart in the Puritan case, and hence that the jurisdiction of the State court has been ousted, except that under the Commerce Act suit may be brought in a State court to enforce the award. We are clear that this contention is not tenable in respect to the facts in this case, for, first, the period sued for and right of action accruing antedates any order of the Interstate Commerce Commission; and second, the suit here does not purport to recover damages for that which is purely interstate commerce. The things complained of, therefore, were not violations of any orders of the Commission. If Mr. Justice Stewart's opinion is conceded by the defendant to be the law, it is clear

that in no way does he make any order of the Commission
 217 oust jurisdiction of the State court for an offense antedating the order. His opinion is, that without some order of the Commission the particular offense complained of in this case was not an offense against the Interstate Commerce Act. The terms of that Act were too general to define what was an offense under it. It remained and was left for the Interstate Commerce Commission to define and specifically name that which constituted discrimination. When it does so define and particularize the field is occupied so far as interstate commerce is concerned. That opinion does not hold, and neither does any opinion in the State or Federal courts hold that such jurisdiction is exclusive in the Federal tribunals, except as to interstate commerce. As to commerce wholly within the State the Interstate Commerce Act itself expressly, in one of its provisos, says that it does not apply to transportation wholly within the State. This is one of the important clauses or provisos of Section one. Reading into the Interstate Commerce Act therefore, the order of the Commission in the Puritan case, No. 1111, simply creates that which by future conduct of the Railroad Company will be an offense cognizable in that court as to interstate commerce only. This question of the divided jurisdiction of the courts with respect to inter and intrastate commerce is clearly recognized in both the State and Federal tribunals. *Wright vs. B. & O. R. R. Co.*, 32 Superior Court 5-12. *Hillsdale C. & C. Co. vs. P. R. R. Co.*, 229 Pa. St. 61. *Missouri Pacific Railway Co. vs. Larabee Flour Mills Co.*, 211 U. S. 612.

We do not understand that recent decisions of the United States Supreme Court, handed down January 6th, 1913, modify the principles of the opinion in the *Missouri Pacific Railway Co. vs. Larabee Flour Mills Co.*, last cited. These recent decisions simply reiterate the exclusive jurisdiction of the United States courts with respect to interstate commerce, and do not pretend to broaden the
 218 jurisdiction of the United States courts to that which is purely intrastate. In this respect, of course, there is a wide divergence of contention in this case as to what is and what is not intrastate commerce. According to the undisputed testimony of the plaintiff's witnesses, 95 to 98 per cent. of the coal mined at its several mines was sold by it f. o. b. cars at the mines. Irrespective of the point of destination we have held in this case, as in the Puritan case, that so far as the relation between the plaintiff Company and the de-

fendant Company to coal sold f. o. b. cars at the mines was concerned it was an intrastate transaction; that it did not become the subject of interstate commerce until actually in transit, duly manifested to a point without the State. Cars, like sidings or switch connections, are simply a facility of transportation, absolutely necessary to the carrying on of the bituminous coal trade. The plaintiff, as well as the defendant corporations are State institutions, with State charters and subject to State regulations. It is only when in accepting commerce to transport without the State the carrier becomes subject to other than State laws and State Courts. The coal mined in plaintiff Company's mines does not become, by the act of mining and loading, the subject of interstate commerce until actually manifested. After being loaded, no car is the subject of interstate commerce and only becomes so by being manifested to some point without the State. Even then, when so manifested without the State, it is only when the car containing the coal so manifested is actually in transit that it becomes the subject of interstate commerce. At that time the coal on the car as commerce is not under and subject to the control of the shipper, if sold f. o. b. cars at the mines. It is then the property of the vendee, subject only to his control and for which the shipper cannot maintain any action in case of loss in transit, or in case of a refusal by the vendee to accept, or in case of demurrage charged against it. If sold by the Railroad Company because of non-acceptance or because of demurrage

219 charged against it, the shipper has no right of recovery.

The railroad Company owes no duty to the shipper and the relation of the parties with respect to the coal pertains wholly as between the railroad company and the buyer. *Mull vs. Pennsylvania Railroad*, 38 Superior Court 416. *Diehl vs. McCormick*, 114 Pa. St. 584. *Dannemiller vs. Kirkpatrick*, 201 Pa. St. 218. *Dentzel vs. Island Park Assn.* 229 Pa. St. 403. The question of jurisdiction with respect to coal shipped is decided squarely in this State in *Wright vs. B. & O. Railroad Co.*, 32 Superior Court 5-12. In that case the question, as far as jurisdiction was concerned, turned on the point or place where the plaintiff's relation to the coal terminated. If within the state, the relation of shipper to common carrier was not that of an interstate relation and left jurisdiction unquestioned in the State court. The United States authorities are to the same effect. Goods are not exports or in process of exportation until committed to a common carrier for transportation out of the State or started on such ultimate passage. When actually in transit to another State property becomes the subject of interstate commerce and ceases to be governed by domestic law with respect to taxes and begins to be governed by the national law of commerce regulation. *Coe vs. Errol*, 116 U. S. 517. *Diamond Match Co. vs. Ontonagon*, 188 U. S. 82, *Kelley vs. Rhoads*, 188 U. S. 1. *P. & S. Coal Co. vs. Bates*, 156 U. S. 577. *Brown vs. Houston*, 114 U. S. 622. The doctrine of *Coe vs. Errol*, *supra*, and the other cases above cited, are re-affirmed in *Gulf C. & H. R. Co. vs. Texas*, 204 U. S. 403. In that case a shipment of grain was made from Hudson, South Dakota, to Texarkana Texas via Kansas City, over certain railroads. At Texar-

kana it was trans-shipped to Goldthwaite Texas, over two other railroads. Under a Texas statute a penalty was inflicted upon the railroad company making ultimate delivery, for rate extortion. The railroad resisted on the ground that the shipment having originated at Hudson, South Dakota, was an interstate one and not
220 subject to the regulation of the State law. The Supreme

Court held that the interstate character of the transportation ceased on arrival of the corn at Texarkana and that thereafter between points in Texas the railway company was subject to the State law. The same doctrine is re-asserted in *Southern P. Terminal Co. vs. Interstate Commerce Commission*, 219 U. S. 498. Mr. Justice McKenna, at page 527, says: "Goods are in interstate and necessarily as well in foreign commerce when they have actually started in the course of transportation to another State or been delivered to a carrier for transportation."

It follows, therefore, as a logical sequence that until actually started or until actually delivered they are not in interstate commerce. A car at a tipple, duly loaded with coal, not manifested, is not actually delivered. Another case, which perhaps more clearly than any other case shows when coal is subject to the laws of the United States controlling interstate traffic, is *United States vs. D. & H. C. Co., et al.*, 213 U. S. 366. This case involved the interpretation of the commodities clause of the Hepburn Act prohibiting railroad companies from transporting between States, etc. any article or commodity manufactured, mined or produced by or under its authority. It is there held by Mr. Chief Justice White that the said commodities clause did not apply to coal mined and shipped, where the railroad company so mining and shipping had "in good faith before the transportation dissociated itself from said article or commodity." In other words, he held that if *if* at the time of transportation the coal was not owned, in whole or in part, by the transporting carrier, the prohibitive clause of the Hepburn Act did not apply. In effect, therefore, the case of the *United States vs. D. & H. C. Co.*, supra, is a clear recognition of the principle on which the decision in this case is based, namely, that the plaintiff having sold practically
221 all of its coal f. o. b. cars at the mines, the coal so sold was not coal subject to interstate commerce regulations and was expressly excluded from the interstate commerce Act by the very letter of the Act. This being so, it follows conclusively that this Court had jurisdiction not only of the persons but of the subject matter of this controversy in any original action which the said plaintiff saw fit to bring in this Court, either at common law or under our statutes. Did it lose this right, however, by proceeding originally in a United States tribunal, namely, the Interstate Commerce Commission? It did become the complainant before said Commission. It did get an award of damages for what we understand to be practically the same subject matter. It did not, however, pursue that award to recovery. Neither is there any allegation that the award has been paid. Had it been paid by the defendant Company another and different question might arise. The plaintiff saw fit either to abandon said action or to let it remain quiescent and to

pursue its rights in this Court, a State tribunal. The learned Counsel for defendant contends that this suit is barred because of the recovery of the award. It is of course well settled that a judgment obtained in a court of competent jurisdiction is a bar to a second suit, whether in law or equity. *Carville vs. Garrigues*, 5 Pa. St. 152. *Taylor vs. Cornelius*, 60 Pa. St. 187. *Williams vs. Row*, 62 Pa. St. 121. An award of arbitrators, after reference thereto, is equally binding. *Lloyd vs. Barr*, 11 Pa. St. 41. *Garvin vs. Dawson*, 13 S. & R. 246. The above cases cited from the brief of the learned Counsel for the defendant are conclusive of the principles therein set forth, but the argument made therefrom to the effect that the award of the Interstate Commerce Commission is equally a bar as is a judgment, a decree in equity or an award of arbitrators, is not sustainable on any authority. The language of the Interstate Commerce Act does not make the award a judgment enforceable by the Commission or even by a court. It does make that award, 222 when used as the basis of a suit in a United States court, a prima facie finding of the facts therein stated. An amendment to the original Interstate Commerce Act gives jurisdiction, after action by the Interstate Commerce Commission, to State courts, but does not lay down even the principle that the award is prima facie evidence of anything. This award of the Interstate Commerce Commission is clearly distinguishable from a judgment in every respect. It is not enforceable by any process. It does not become a lien upon any property of a defendant. It does not purport to be final and conclusive in any way. If used even as a prima facie evidence of what it purports to contain, it is subject to attack when so used in a duly established court. Such attack could well raise the questions on which we base this opinion; first, that the commission exceeded its jurisdiction in making such an award for acts committed by the defendant prior to its order or decree; or second, the defendant Company could make a defense against the award alleging want of jurisdiction in the Interstate Commerce Commission on the ground that the coal, which is the subject matter of the award, was sold f. o. b. cars at the mines and hence not interstate commerce. Thus using the very arguments on which we base the contention in the opinion in this case for the right of jurisdiction in the State courts. If paid, it of course would have the effect of a bar, just as would a settlement or any other adjustment privately or publicly made. But it is clear that it is not and was not intended to have the effect of a judgment, and hence it cannot be said that the parties had their day in court before a court of competent jurisdiction. To be used as a bar or as the subject matter of a plea of *res adjudicata* there must be the award, unappealed from, of a duly constituted tribunal, the judgment of a court of competent jurisdiction, or the decree following a bill in equity, duly enforceable by the regular recognized processes of the court or tribunal issuing the award, the judgment or the 223 decree. The Interstate Commerce Commission is not a court and does not purport so to be. Its functions are rather administrative than judicial. In its proceedings it does not necessarily

follow or strictly observe the forms of legal procedure. The law provides that the Commission must itself become an actor or party in a court of justice to enforce its decrees or sustain them when appealed from to the court. Hence, we conclude that this award cannot be used as a bar and could only be so used if paid by defendant, which is not alleged in this case.

No other matters urged as a reason for new trial are brought specifically to the attention of the Court. A number of contentions were raised in the course of the trial and by carefully drawn points submitted by Counsel for defendant. All of these were, we believe, fully disposed of in the final charge to the jury. The verdict can hardly be said to be excessive, in view of the fact that the Interstate Commerce Commission awarded the same plaintiff, for only three of its mines, for the same period, the sum of \$31,127.96, while this suit is for two other mines in addition thereto. The award of \$41,481.00, as single damages, is apparently therefore not far in excess of that which the seven learned gentlemen constituting the Interstate Commerce Commission decided, on what we presume was practically the same testimony to have been the damages sustained by the plaintiff.

On the whole case, therefore, we are of opinion that the verdict should stand.

224

Decree.

Now, February 10th, 1913, the Motion and Rules for judgment non obstante veredicto and for arrest of judgment and new trial, are hereby overruled and discharged, and judgment is directed to be entered in favor of the plaintiff and against the defendant on the verdicts, on payment of the jury fee as required by law.

At request of Counsel for defendant, exception to this action is noted for defendant and bill sealed.

By the Court,
(Signed)

ALLISON O. SMITH, P. J.

Filed Feb. 10, 1913. John H. Moore, Prothonotary.

225

No. 81, January Term, 1913.

CLARK BROTHERS COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

Appeal from Court Common Pleas, Clearfield County.

VIII. *Assignments of Error.*

1. The Court below erred in overruling the defendant's motion to dismiss the case for want of jurisdiction to entertain the same.
(Appendix, page 786a.)

* * * * *

12. The Court below erred in refusing the defendant's third point, which point was as follows:

"3. The evidence has established that the bituminous coal transported by the defendant during the period of the action was transported from mines located in the State of Pennsylvania to points both within and without the State; that in making distribution of its coal cars among shippers of such coal during the period of action, the defendant did not make one distribution of cars intended for shipments to points within the State and another one of cars intended for shipments to points without the State, but made but one distribution, leaving the shippers at liberty to use the cars for shipments to points either within or without the State as they might elect. Under these circumstances, the defendant, in respect to the distribution made, was subject to the obligations and prohibitions imposed upon it by the said Acts of Congress, known as the 'Interstate Commerce Acts,' and to these exclusively, and as action for non-observance of obligations or of prohibitions imposed by or embodied in these Acts are cognizable exclusively either by the Interstate Commerce Commission or by the Courts of the United States, there can be no recovery in this action by the plaintiff of the discrimination complained of."

(Page 44.)

13. The Court below erred in refusing the defendant's fourth point, which point was as follows:

226 "4. The evidence has established that prior to the institution of this action the Interstate Commerce Commission of the United States, acting under and pursuant to the authority conferred upon, and vested in, it by the Acts of Congress, known as the 'Interstate Commerce Acts,' defined and prescribed the method or system of car distribution which should have been observed and followed by the defendant in this action during the period thereof. As the result of such action by the said Commission, and of the orders previously made by the Commission, which have been given in evidence, defining and prescribing the method of car distribution which the said Interstate Commerce Act enjoined upon carriers subject to its provisions, this Court is without jurisdiction to entertain the present action, in so far as it is rested upon the discrimination complained of by the plaintiff, and the plaintiff consequently is not entitled to recover on this ground."

"Refused."

(Page 45.)

14. The Court erred in refusing the defendant's fifth point, which point was as follows:

"5. The evidence has established that prior to the institution of the present action, to wit, on or about the 5th day of June, 1907, the plaintiff in this action instituted a proceeding against the defendant in this action before the Interstate Commerce Commission of the United States for the purpose of obtaining, inter alia, an award in its favor covering the damages which it complained it had sus-

tained because of the failure of the defendant to properly rate its mines, Falcon Nos. 2, 3 and 4, and to give to them the number of cars which it claimed should have been delivered at these mines if a proper system or method of distributing its cars had been pursued by the defendant, and because of the inadequacy of the defendant's equipment during the period of the present action; that the said proceeding eventuated in two reports and orders promulgated 227 by the said Interstate Commerce Commission on March 7, 1910, and March 11, 1912, respectively, the latter of which made an award of damages in favor of the plaintiff in the said proceeding, being the plaintiff in this action, and against the defendant in said proceeding, being the defendant in this action, covering the loss which the Commission found the plaintiff had sustained because of the failure of the defendant to give to the said Falcon Mines Nos. 2, 3 and 4, the cars which the Commission found should have been delivered to them, and which would have been used for interstate shipments. Such proceeding and the award of the Commission made therein preclude the plaintiff from maintaining the present action, in so far as it relates to Falcon Mines Nos. 2, 3 and 4, and from recovering herein the loss, if any, which it sustained because of the failure of the defendant to give to the said mines more cars than were delivered at the said mines during the period of the action."

"Refused, reserving the legal propositions involved therein."
(Page 46.)

15. The Court below erred in refusing the defendant's sixth point, which point was as follows:

"6. It appears that in the proceeding instituted before the Interstate Commerce Commission by the plaintiff against the defendant the award made in favor of the plaintiff was based upon and covered the loss which the Commission found the plaintiff had sustained due to the greater cost of producing all the coal mined in the period of this action at Falcon Mines Nos. 2, 3 and 4, because of the failure of the defendant to place a larger number of cars at the mines named than were actually delivered to them. The plaintiff cannot, therefore, in the present action recover the amount of such increased cost."

"Refused, reserving the legal propositions involved therein."
(Page 47.)

16. The Court below erred in refusing the defendant's seventh point, which point was as follows:

"7. The plaintiff cannot recover in this action the damage or loss, if any, sustained as the result of its failure to receive from the defendant cars which would have been used for shipments to points without the State of Pennsylvania. Cars which would have been consigned by the plaintiff to purchasers at destinations outside the State would have been so used, even though the coal loaded therein was sold under contracts providing for delivery to such purchasers f. o. b. cars at the plaintiff's mines."

"Refused."
(Page 47.)

* * * * *

228 18. The Court below erred in refusing the defendant's ninth point, which point, and the answer of the Court thereto, were as follows:

"9. The evidence has established that the Interstate Commerce Commission has determined that the system or method of ratings pursued by the defendant during the period of the action was a proper and lawful one, and subjected the plaintiff and other shippers to no discrimination or disadvantage, and that the ratings actually given to the plaintiff's mines were fair and proper. This determination by the Commission is binding and conclusive, and the plaintiff cannot, therefore, recover in the present action because of the ratings actually given to their mines."

Answer: "Refused, for the reason that while the system or method of rating adopted by the defendant company may have been sanctioned by the Interstate Commerce Commission, the question here was as to whether or not there was discrimination practiced against the plaintiff even under that system or method of rating."

(Page 48.)

19. The Court below erred in refusing the defendant's eleventh point, which point, and the answer of the Court thereto, were as follows:

"11. There is no evidence which would warrant the jury in finding that the plaintiff was subjected to any unlawful discrimination because of the ratings given to its mines during the period of the action by the defendant."

Answer: "Refused, for the reason that there is some evidence tending to show an unlawful and unfair discrimination because of the ratings in comparison with the mines of other shippers."

(Page 49.)

229 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 81.

CLARK BROTHERS COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Appeal by Defendant from the Judgment of the Court of Common
Pleas of Clearfield County.

Filed June 27, 1913.

MESTREZAT, J.:

This is an action of trespass to recover damages for alleged unlawful discrimination in the distribution of coal cars under our act of assembly of June 4, 1883, P. L. 72, 4 Purd. 3906. We have carefully examined all of the large volume of testimony submitted and are satisfied that the essential elements of the plaintiff's case were made out by evidence which required it to go to the jury. There

was considerable conflict between the testimony of the plaintiff and that introduced by the defendant as to the capacity of the plaintiff's mines, the actual number of cars supplied to them, the proportion between the supply to plaintiff company and to other companies which were alleged to have been unlawfully favored, the extent to which plaintiff would have been entitled to share in the alleged oversupply of cars to the favored companies, and the measure of damages, but the testimony was submitted to the jury by the learned trial judge in a clear and comprehensive charge in which we can find no reversible error. We must, therefore, regard the jury's finding on these and the other questions of fact involved in the case as conclusive. The learned trial judge was appealed to by the defendant company to correct the errors complained of by it in the jury's findings of fact, but after a complete review of the testimony in a clear and well considered opinion, he held that the findings of the jury were sustained by the evidence and declined to disturb the verdict.

230 As in *Sonman Shaft Coal Company vs. Pennsylvania Railroad Company*, now pending before us and in which an opinion is filed herewith, the judgment was obtained against the defendant in the present case for failure to furnish an adequate supply of coal cars, and, as here, the question of the jurisdiction of a state court to determine the action was challenged. The contention of the defendant company, which is the appellant here, is that in respect to the distribution of its cars to the several mines on its road it is subject exclusively to the obligations and prohibitions of the Interstate Commerce Act, and that if it has failed to observe or conform to these to the injury of the shipper, his recourse is to the Federal tribunals designated by the Interstate Commerce Act as those before which actions of such a character can be maintained. We have sustained the jurisdiction of our courts in the *Sonman* case, holding that the question has been ruled in *Puritan Coal Mining Company vs. Pennsylvania Railroad Company*, 237 Pa. 420, and *Walnut vs. Pennsylvania Railroad Company*, 237 Pa. 410. If we correctly understand the defendant's position, it is conceded that the *Puritan* case sustains the jurisdiction in the present case unless the proceedings instituted against certain railroad companies by the plaintiff and other shippers before the Interstate Commerce Commission for the adjustment of car distribution and alleged discrimination differentiate it from that case. It is claimed that the orders issued by the Commission in these proceedings have ousted the jurisdiction of the state courts in matters dealt with by the Commission. This contention is not tenable in view of the fact that the action was brought under our act of 1883 to recover for unlawful discrimination in the distribution of freight cars, and the orders of the Interstate Commerce Commission have no relevancy to or bearing upon the questions raised in the record for adjudication. In his opinion refusing judgment non obstante, the learned trial judge, after quoting freely from the opinion of this court in the *Puritan* case to sustain his view on this branch of the present case, pertinently says: "The

231 above quotation from the Puritan case is equally applicable to the facts in this case. The offense alleged here is that of discrimination pure and simple. No specific offense created by the express terms of the Federal statute is alleged to have been violated. Neither is any offense against any order of the Commerce Commission set up as the basis of recovery. The period sued for between October, 1905, and April 30, 1907, antedates all general rules, regulations or orders of the Interstate Commerce Commission which could by any construction be said to be applicable to the case in hand. We are clear, therefore, that the general proposition of a want of jurisdiction in the State court is not sustainable."

We do not regard as sound the contention that the plaintiff company is precluded from prosecuting this action because it complained to and had a ruling by the Interstate Commerce Commission against the discriminatory acts of the defendant. It appears that practically all the coal involved in this action was sold f. o. b. cars at the mines, and is, therefore, not subject to Interstate Commerce regulation. This is necessarily so on principle and seems to be the effect of the numerous decisions of the Supreme Court of the United States which are cited and commented on in the opinion of the learned court below. It may also be suggested that the present action is not based on a violation of a Federal statute or on any other rule or regulation of the Interstate Commerce Commission but on a tort committed against the plaintiff in violation of the statutory duty of the defendant company as a common carrier. It is, therefore, not apparent how the orders or regulations of the Interstate Commerce Commission can deprive the state court of jurisdiction in the present action.

We do not think the award of damages to the plaintiff by the Interstate Commerce Commission prevents a recovery in this case. Had the award been enforced by a suit in a Federal Court, the defendant's contention that it is a defense to the present action might have some force. But it is not alleged that any proceedings were taken before the Commission to enforce the award or that it has been paid. A judgment of a court of competent jurisdiction is a bar to further proceedings on the claim in any tribunal. But an award of the Interstate Commerce Commission is not a judgment in the sense that it concludes the enforcement of the claim on which it rests in a court having jurisdiction of the cause of action. The act of Congress gives no such effect to an award but simply makes it prima facie evidence of the facts contained therein in an action brought on it in a State or Federal Court. When introduced as evidence to support the claim it is, like other evidence, open to attack and may be wholly discredited. The award by the Interstate Commerce Commission in this case is not a defense to this action.

232 The other and minor questions raised on the trial below and on this appeal have been satisfactorily considered and disposed of in the opinion of the learned trial judge in overruling the motion for a new trial and for judgment non obstante, and further discussion here is unnecessary.

The judgment is affirmed.

233 In the Supreme Court of the United States, — Term, 1913.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
 vs.
 CLARK BROTHERS COAL MINING COMPANY, Defendant in Error.
 COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

On this 23rd day of September in the year of Our Lord one thousand nine hundred and thirteen, before me the undersigned a Notary Public in and for the said County and State, resident at Clearfield, Pennsylvania, personally appeared Jas. P. O'Laughlin who being duly sworn according to law doth depose and say that he served a copy of the Specifications of Error of the Plaintiff in Error in the proceeding in error to the Supreme Court of Pennsylvania, upon Alfred M. Liveright, of the attorneys of record for the said Clark Brothers Coal Mining Company, the defendants in error, plaintiff below, by handing him a true and correct copy of the said Specifications of Error, on the 23rd day of September A. D. 1913.

JAS. P. O'LAUGHLIN.

Sworn to and subscribed before me this 23rd day of September A. D. 1913.

[Seal Walter Welch, Notary Public, Clearfield, Penna.]

WALTER WELCH,
Notary Public.

Commission expires Feb. 21, 1915.

234 In the Supreme Court of Pennsylvania, Eastern District,
 January Term, 1913.

No. 81.

CLARK BROTHERS COAL MINING COMPANY
 vs.
 THE PENNSYLVANIA RAILROAD COMPANY, Appellant.

*Præcipe Indicating the Portions of the Record to be Incorporated
 Into the Transcript of the Record on Writ of Error.*

To the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania:

Pursuant to Section 1, of Rule 8, of the Rules of Practice of the Supreme Court of the United States, you are respectfully requested to incorporate into the Transcript of the Record to be certified to the Supreme Court of the United States, and there filed in connection

with the Writ of Error heretofore sued out from the Supreme Court of Pennsylvania to the said Supreme Court of the United States in the above entitled case, the following portions of the Record:

235 1. Original statement of plaintiff's claim (printed on page 772a et seq. of the Appendix of Appellant's paper book filed in this case in the Supreme Court of Pennsylvania, a copy of which is hereto attached and marked Exhibit "A").

2. Rule on the defendant to plead (printed on page 783a of Exhibit "A" hereto attached).

3. Defendant's petition to dismiss action for want of jurisdiction (printed on page 784a et seq. of Exhibit "A" hereto attached).

4. Order of the Court over-ruling motion to dismiss for want of jurisdiction as follows: "Now, November 4th, 1912, motion to dismiss is over-ruled. Exception noted for defendant. By the Court, Alison O. Smith, P. J." (Printed on page 786a of Exhibit "A" hereto attached).

5. Plaintiff's motion to amend statement of claim (printed on page 787a of Exhibit "A" hereto attached).

6. Defendant's motion to continue and plea of surprise (printed on page- 787a and 788a of Exhibit "A" hereto attached).

7. Order of the Court allowing amendment (printed on page 787a of Exhibit "A" hereto attached).

8. Order of Court over-ruling defendant's plea of surprise, and refusing to continue the case (printed on page 787a of Exhibit "A" hereto attached).

9. Plaintiff's amended statement of claim, (printed on page 789a et seq. of Exhibit "A" hereto attached).

10. Demurrer to plaintiff's statement of claim (printed on page 800a et seq. of Exhibit "A" hereto attached).

11. Defendant's motion to strike off demurrer and court's order thereon (printed on page 803a of Exhibit "A" hereto attached).

12. Defendant's pleas (printed on page 803a et seq. of Exhibit "A" hereto attached).

13. The following excerpts from the testimony:

The testimony of J. O. Clark (printed on pages 26a to and including the 24th line on page 50a of Exhibit "A" hereto attached).

The testimony of J. O. Clark on page 59a of Exhibit "A" hereto attached as follows:

"Q. What proportion of your shipments was made f. o. b. cars at mines in Clearfield County?

"A. Practically all of it. I would say from 95 to 98 per cent of the total tonnage was sold f. o. b. cars at the mines."

The testimony of J. O. Clark on pages 64a and 65a of Exhibit "A" hereto attached, beginning with the question on page 64a:

"Q. Mr. Clark, with respect to the question of ratings of your mines, is it not a fact that on October 20th, 1906, Mr. Womelsdorf, at your instance, made an examination of the mines in order to determine their physical capacity and made a report to you which showed a physical capacity for Falcon No. 2 mine of 600 tons, at No. 3 of 120 tons and No. 4 of 275 tons?" ending with the answer on page 65a of Exhibit "A" hereto attached, "A. I believe that was their statement."

The testimony of J. O. Clark, (printed on pages 238a to 241a of Exhibit "A" hereto attached, beginning with the question, "By Mr. Gowen: "Q. When you were on the stand before I asked you as to the contracts which you had outstanding during the period of the action for the sale of coal?" and ending with the answer at the bottom of page 241a, "A. I think that is it. (Statement marked Defendant's Exhibit No. 2)").

Defendant's exhibit No. 2 (printed on page 577a of Exhibit "A" hereto attached).

The testimony of J. O. Clark (printed on pages 368a to 372a of Exhibit "A" hereto attached, beginning with the question on page 368a "By Mr. Cole: Q. Mr. Clark, have you had prepared a statement showing your estimated losses in this case?" and ending with the answer on page 372a, "A. No sir, not to any one customer.")

The testimony of Joseph H. Dorn (printed on pages 184a to 191a of Exhibit "A" hereto attached, beginning with the question on page 184a, "By Mr. Cole: Q. Where do you live?" and ending with the statement of counsel on page 191a, "Mr. Gowen: I will reserve the letter then until later").

The testimony of E. C. Howe (printed on pages 211a to 215a, of Exhibit "A" hereto attached, beginning with the question on page 211a, "Q. What is your business?" and ending with the answer on page 215a, "A. On this date, July 9th, 1906, the man that the Pennsylvania Railroad Company sent there to rate the mine, we agreed on a capacity of 200 tons for Falcon No. 5. Now do you want No. 6? And on the same date we agreed on an output from No. 6 of 100 ton a day. Making the capacity of the two mines 300 ton").

Defendant's offer of Exhibit "A" (printed on page- 674a, 675a and 676a, beginning with the formal offer by counsel on page 674a of Exhibit "A" hereto attached, "Saturday, November 23rd 1912, Court convened at 9 A. M." to and including defendant's exhibit "A").

The testimony of M. Trump (printed on pages 390a to 393a of Exhibit "A" hereto attached, beginning with the question on page 390a, "By Mr. Gowen: Q. In the period of the present action you were General Superintendent of Transportation of the Pennsylvania Railroad, were you not?" and ending with the last answer "Yes sir" on page 393a.

The testimony of M. Trump, recalled, (printed on pages 661a to 674a of Exhibit "A" hereto attached, beginning with the question on page 661a, "Q. When you were on the stand this morning we neglected to ask you what method was pursued in determining the ratings of the mines during this period, during the period of the action?" and ending with the answer on page 674a, "A. My recollection is that 1905 was a fairly good year. 1906 was a fairly good year, with the exception of the strike period and shows that it was an average from the tonnage shipped, which I have given you. And 1907 was the best year that we had. We moved more coal

tonnage and I presume the car shortages was more acute on the whole in 1907 than they were in 1906."

237 The testimony of George W. Creighton (printed on pages 579a, 580a and 581a of Exhibit "A" hereto attached, beginning with the question on page 579a, "Q. What position did you hold with the Pennsylvania Railroad in the years 1905 and 1906 and 1907?" and ending with the answer on page 581a, "A. Oh no. If there should such a thing happen for a moment and there is a demand for the cars we would simply put on more engines and crews."

14. Defendant's Exhibit No. 3 entire (printed on page 411a et seq. of Exhibit "A" hereto attached).

15. The following excerpts from Defendant's Exhibit No. 4 (printed on page 427a of Exhibit "A" hereto attached, beginning at the top of the said page 427a as far as to "Claim of the Hillsdale Company" on page 429a; beginning again on page 433a, with the words "Claim of Clark Brothers Company" as far as to the words "Bulah Coal Company" on page 435a; beginning again on page 437a with the paragraph commencing "In cases of this kind there is a natural tendency on one side to enlarge" and ending on page 439a at the words "No. 1063 Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company"; beginning again on page 440a at the words "No. 1111, Clark Brothers Coal Mining Company v. The Pennsylvania Railroad Company" and ending on page 441a at the words "No. 1136, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company v. The Pennsylvania Railroad Company."

16. Defendant's Exhibit No. 5 entire (printed on page 443a et seq. of Exhibit "A" hereto attached).

17. The following excerpts from the defendant's exhibit No. 7, (printed on page No. 461a et seq. of Exhibit "A" hereto attached, beginning with the words "Copy of Defendant's Exhibit No. 7" on page 461a, and extending as far as to the paragraph on page 466a which begins "It thus appears that the orders of the Commission" etc.; beginning again at the top of page 471a at the paragraph which commences "We come now to the practice" etc. as far as to the paragraph on page 476a which begins "In view of our finding herein" etc.; beginning again on page 514a with the words, "Order. At a General Session of the Interstate Commerce Commission" etc. and ending on page 515a, at the copy of Defendant's Exhibit No. 8.

18. Defendant's Exhibit No. 8 entire, (printed on pages 515a et seq. of Exhibit "A" hereto attached).

19. The following excerpt from Defendant's Exhibit No. 9, beginning on page 553a of Exhibit "A" hereto attached, at the words "At a general session of the Interstate Commerce Commission, etc." and ending at the bottom of page 555a.

20. The following excerpt from Defendant's Exhibit No. 10 (printed on page 556a et seq. of Exhibit "A" hereto attached, beginning on page 574a with the words "Order, At a General Session of the Interstate Commerce Commission", etc. and extending as far as to the paragraph on page 575a, "Mr. Gowen: If the Court please, we offer in evidence" etc).

21. Defendant's points Nos. 3, 4, 5, 6, 7, 9 and 11 (printed on pages 44, 45, 46, 47, 48 and 49 of Appellant's paper book filed in this case in the Supreme Court of Pennsylvania, a copy of which is hereto attached and marked Exhibit "B").

238 22. Verdict of the jury and judgment thereon (printed on page 67 of Exhibit "B" hereto attached).

23. Defendant's motion in arrest of judgment and for new trial (printed on page 807a of Exhibit "A" hereto attached).

24. Defendant's motion for judgment non obstante veredicto (printed on page 808a of Exhibit "A" hereto attached).

25. Opinion of the trial court sur defendant's motions in arrest of judgment and for new trial and for judgment non obstante veredicto (printed on page 808a et seq. of Exhibit "A" hereto attached).

26. Decree of trial court sur said motions (printed on page 825a of Exhibit "A" hereto attached).

27. Appellant's assignments of error in the Supreme Court of Pennsylvania, Nos. 1, 12, 13, 14, 15, 16, 18 and 19 (printed on pages 67, 72, 73, 74, 75 and 76 of Exhibit "B" hereto attached).

28. Opinion of the Supreme Court of Pennsylvania affirming the judgment of the court below.

29. Petition filed by the plaintiff in error with the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, praying for the allowance of a writ of error from the Supreme Court of Pennsylvania to the Supreme Court of the United States.

30. Action of the Honorable D. Newlin Fell, Chief Justice, allowing the writ of error.

31. Writ of error on appeal to the United States Supreme Court.

32. Specifications of error filed by the Plaintiff in Error.

FRANCIS I. GOWEN,

Attorney for the Plaintiff in Error.

239 COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

On this 23rd day of September in the year of our Lord, one thousand nine hundred and thirteen, before me, the undersigned, Prothonotary of the Court of Common Pleas of said County personally appeared Jas. P. O'Laughlin who being duly sworn according to law doth depose and say that he served a copy of the foregoing Præcipe upon Alfred M. Liveright, of the attorneys of record for the said Clark Brothers Coal Mining Company, the defendant in error, plaintiff below, by handing him a true and correct copy of the said Præcipe, and of the Exhibits thereto attached, on the 23rd day of September A. D. 1913.

JAS. P. O'LAUGHLIN.

Sworn to and subscribed before me this 23rd day of September, 1913.

[Seal Court of Common Pleas, Clearfield County, Pa.]

JOHN H. MOORE, *Proth'y.*

240 STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true and correct copy of the Record in the above entitled cause, so full and entire as is indicated by the attached præcipe.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 11th day of October, A. D. 1913.

[Seal of the Supreme Court of Pennsylvania, Eastern District,
 1776.

ALFRED B. ALLEN,
Deputy Prothonotary.

241 I, D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that Alfred B. Allen was, at the time of signing the annexed attestation, and now is, Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 11th day of October one thousand nine hundred and thirteen.

D. NEWLIN FELL.

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, that the Honorable D. Newlin Fell by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 11th day of October one thousand nine hundred and Thirteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District,
 1776.

ALFRED B. ALLEN,
Deputy Prothonotary.

1a In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 81.

CLARK BROTHERS COAL MINING CO.

VS.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

To the Honorable John P. Elkin, Justice of the Supreme Court of Pennsylvania:

15th November, 1913, come A. L. Cole and A. M. Liveright, Attorneys for the Clark Brothers Coal Mining Company, defendant in error in the above stated case, and respectfully aver that the plaintiff in error, the Pennsylvania Railroad Company, on September 23, 1913 served a copy of the præcipe directed to the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania, indicating the portions of the record it wanted incorporated in the transcript of the record upon writ of error; that it was impracticable within 10 days thereafter to prepare and lodge with the Prothonotary of the Supreme Court of Pennsylvania the counter præcipe of the defendant in error; that by inadvertance, counsel for the defendant in error failed within 10 days of service upon them of the præcipe of the plaintiff in error, to obtain an order from the Supreme Court of Pennsylvania enlarging the time for them to file their counter præcipe.

Petitioners aver that it is provided by Section 1 of Rule 10 of the United States Supreme Court that the time for filing such counter præcipe may be enlarged by a Judge of the Court whose decision is made the subject of review, or by a justice of
2a the United States Supreme Court.

Petitioners further aver that it is important for a proper consideration of the case upon review by the United States Supreme Court that additional portions of the record be incorporated in the transcript of record to be submitted to the Appellate Court.

They therefore respectfully pray your Honor now to make an order enlarging the time for filing their præcipe until the 6th day of December, 1913.

And they will ever pray.

A. L. COLE.

A. M. LIVERIGHT.

STATE OF PENNSYLVANIA,
County of Clearfield, ss:

A. M. Liveright, one of the petitioners, being duly sworn according to law, deposes and says that the matters in the foregoing petition averred are true and correct to the best of his knowledge, information and belief.

A. M. LIVERIGHT.

Subscribed and sworn to before me this 15th day of November, 1913.

[SEAL.]

JAMES K. HORTON,
Notary Public.

My commission expires March 14, 1915.

3a

Order of Court.

And now 17th day of November, 1913, the foregoing petition of A. L. Cole and A. M. Liveright, Attorneys for the Clark Brothers Coal Mining Company, presented, read and considered, and thereupon it is ordered that the time for filing with the Prothonotary of the Supreme Court of Pennsylvania, the præcipe of said named defendant in error, indicating the additional portions of the record desired by it to be incorporated into the transcript of the record to be filed in the United States Supreme Court, be enlarged to December 6, 1913; and it is further ordered that the additional portions of the record that may be designated by the defendant in error pursuant to leave hereby granted shall be transmitted to the United States Supreme Court as a part of the transcript of the record and be therein incorporated.

JNO. P. ELKIN,
Justice of Supreme Court.

4a Endorsement: In the Supreme Court of Pennsylvania, Eastern District—No. 81 January Term 1913—Clark Brothers Coal Mining Co. v. Pennsylvania Railroad Company—Petition in re Record on Writ of Error to United States Supreme Court.—Presented in Chambers Nov. 17, 1913, and within order made. Jno. P. Elkin, Justice of Supreme Court—Filed Nov. 26, 1913 in Supreme Court—A. L. Cole, A. M. Liveright, Attorneys at Law, Clearfield, Penna.

5a In the Supreme Court of Pennsylvania, Eastern District.
January Term, 1913.

No. 81.

CLARK BROTHERS COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Præcipe of Defendant in Error Indicating Additional Portions of the Record to be Incorporated into the Transcript of the Record on Writ of Error.

To the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania:

In addition to the portions of the record called for by the plaintiff in error, you are respectfully requested to incorporate into the tran-

script of the record to be certified to the Supreme Court of the United States, and there file in connection with the writ of error heretofore sued out in the Supreme Court of Pennsylvania to the said Supreme Court of the United States in the above entitled case, the following portions of the record:

(Signed)

A. L. COLE,
A. M. LIVERIGHT,
Attorneys for Defendant in Error.

(1) Excerpt from the testimony of J. O. Clark, pages 50a, 51a, 52a and 53a in Exhibit "A" attached to the plaintiff's præcipe, to the words "Tuesday, November 19, 1912."

Excerpt from the testimony of J. O. Clark in said Exhibit beginning at page 59a with the sentence "You said in answer to a question by Mr. Gowen that you had a quarrel with their system of rating," continuing over pages 59a, 60a, 61a, 62a, 63a, 64a, 65a, 66a and 67a to the words "By Mr. Gowen."

(2) Excerpt from the testimony of Jacob H. Miller, pages 81a and 111a inclusive in said Exhibit.

(3) Excerpt from the testimony of W. R. Cameron, pages 133a to 136a of said Exhibit, ending with the words "Well I judge about 200 tons."

(4) Testimony of E. B. Chase, pages 137a to 148a inclusive, in said Exhibit.

6a (5) The following excerpt from the testimony of J. A. Jardene, page 154a of said Exhibit.

"Q. State whether or not this period of action, October 1905 to May 1907 constituted a normal time in the coal business?

A. Yes, it was a normal time."

(6) Excerpt from the testimony of A. C. Bowser, page 177a to the first question at the top of 180a.

Also page 181a and page 182a to the question "Was the mine physically capable of producing practically or substantially as much coal in October 1905 as on the 18th of April 1907, all of said testimony being in Exhibit "A."

(7) Excerpt from the testimony of Joseph H. Dorn in said Exhibit, beginning with the words "By Mr. Cole" at page 191a and continuing to testimony of H. A. Gresmer on page 194a.

(8) Excerpt from the testimony of C. W. Proctor in said Exhibit, pages 198a and 199a, to beginning of cross-examination.

(9) Testimony of P. E. Womelsdorf, pages 203a, 204a and 205a of said exhibit.

(10) Excerpt from the testimony of E. C. Howe in said Exhibit, beginning at page 215a with the question "Up to that time what had been your estimate of the output capacity of No. 5?" continuing over pages 215a, 216a and 217a to the answer "That is all."

(11) Excerpt from the testimony of John B. Salsgiver in said Exhibit, pages 220a, 221a and 222a to the answer "Yes we did."

(12) Excerpt from the testimony of E. B. Koozer in said Exhibit, pages 227a and 228a to the words "1000 tons per foot per acre?"

(13) Excerpt from the testimony of Thomas Bryson, in said

Exhibit, from page 259a to 278a inclusive, ending with "Yes quite frequently these things would happen."

(14) Excerpt from the testimony of A. M. Riddle in said Exhibit, beginning at page 283a and concluding on page 293a with the following: "I would say about 18 anyhow."

Also testimony of A. M. Riddle on page 295a beginning with "By Mr. Gowen" and concluding on page 296a with "To the best of my knowledge."

(15) Testimony of W. J. Trevesick in said Exhibit, pages 299a to 301a inclusive.

7a (16) Testimony of J. O. Clark in said Exhibit, pages 310a to 312a inclusive.

(17) Excerpt from the testimony of J. R. Ratew in said Exhibit, pages 312a to 323a concluding with the words "By Mr. O'Laughlin."

Also testimony of same witness from page 326a to page 331a concluding with the words "Falcon No. 4, 41-1/10 per cent."

(18) Plaintiff's Exhibit No. 29 pages 355a to 363a of said Exhibit.

Plaintiff's Exhibit No. 31 at page 364a of same.

Plaintiff's Exhibit No. 32 at page 365a of same.

Plaintiff's Exhibit No. 33 at page 366a of same.

(19) Testimony of Jacob H. Miller, page 367a and page 368a of said Exhibit.

(20) Plaintiff's Exhibit No. 38 at page 383a of said Exhibit.

Plaintiff's Exhibit No. 39 at page 385a of same.

Plaintiff's Exhibit No. 40 at page 387a of same.

Plaintiff's Exhibit No. 41 at page 388a of same.

(21) Excerpt from defendants' Exhibit No. 7 in said Exhibit "A," beginning with paragraph starting "The complainant alleges that the system" at top of page 491a, and concluding with the words "Must have accrued" on the same page.

(22) Excerpt from the testimony of M. Trump in the same Exhibit, beginning with "We don't care what led up to the rule" on page 396a, to words "No sir" on page 398a.

(23) Excerpt from the testimony of G. W. Creighton in the same Exhibit, beginning with the words at page 591a, "Now the times that is covered by this action were ordinary times in the business" continuing to page 593a at the words "No sir, I did not."

Also testimony of same witness beginning at page 594a with the words "Did you follow the percentage distribution" to the words "660-4/10 per cent of the unassigned cars" at the foot of page 595a.

(24) Excerpt from the testimony of M. Trump, page 673a of same Exhibit, beginning with "You knew that Clarks were complaining during the whole period of this action because they didn't get cars enough, didn't you?" concluding with the words "I can't say that in the abstract, sir."

(25) Excerpt from the testimony of G. E. Oler in the same Exhibit, beginning at top of page 683a and continuing to and including the words "I will say every third day then" on page 690a.

8a Excerpt from the testimony of same witness, beginning with the last question at foot of page 693a and continuing to the words "Yes, if you want me to say that, certainly we did" on page 698a.

Excerpt from the testimony of the same witness beginning at page 704a with the question "Now get your sheets for March 1907. What is the distribution on March 7?" and continuing to and including the words "They would. In other words if the distribution sheet would be wrong, the tables would be wrong" at page 718a.

Excerpt from the testimony of same witness beginning at page 723a with "Do you have those rating figures at hand?" to the words "No sir" on page 724a.

(26) Copy of defendant's Exhibit No. 27 at page 744a of same Exhibit.

Copy of defendant's Exhibit No. 33 at page 748a of same Exhibit.

(27) Excerpt from defendant's exhibit No. 7 in said Exhibit "A," beginning with the words "By combining the commercial capacity at line 3 page 469a, and concluding with the words "distribution of equipment" at the end of the same paragraph.

(28) Excerpt from the testimony of P. E. Womelsdorf in said Exhibit, beginning with "Have you had occasion in past years to make an examination of the Urey Ridge Coal Company's operations?" on page 765a, to the conclusion of his testimony at the top of page 771a.

(29) Plaintiff's motion to strike off demurrer, page 803a.

(30) Motion to amend statement as to amount claimed, page 806a.

(31) The charge of the court, pages 15 to 39 inclusive in Exhibit "B" attached to the præcipe of the plaintiff in error.

(32) Plaintiff's points, pages 39 to 43 inclusive in said Exhibit "B" attached to præcipe of the plaintiff in error.

(33) History of the case at pages 3, 4 and 5 of Exhibit "C" hereto attached and made a part of the præcipe of the defendant in error.

9a Endorsement: No. 81 January Term, 1913. In the Supreme Court of Pennsylvania, Eastern District. Clark Brothers Coal Mining Co. vs. Pennsylvania Railroad Company, Appellant. Præcipe of Defendant in Error. Filed Nov. 26, 1913, In Supreme Court. A. L. Cole, A. M. Liveright, Attorneys at Law, Clearfield, Penna.

1 J. O. CLARK, called on part of plaintiff, being duly sworn and examined, testified as follows:

* * * * *

By Mr. GOWEN:

* * * * *

Q. That is all you know about it?

A. Yes sir.

Q. You also testified in chief that your coal was largely sold f. o. b. the mines?

A. Yes sir.

Q. Did your Company sell directly or through sales agents?

A. We aimed to sell most of our coal directly.

Q. Directly?

A. Yes sir.

Q. Through your office in Philadelphia?

A. Through salesmen, through our Philadelphia office.

Q. That is salesmen in your employ exclusively?

A. Yes sir.

Q. Where coal was sold f. o. b. the mine it was shipped by the Clark Coal Mining Company?

A. Yes sir.

Q. Consigned?

A. Consigned by Clark Brothers.

Q. To the ultimate destination?

A. Yes sir.

Q. No matter where that was?

A. Yes sir.

Q. Mr. Liveright read to the jury a letter of Mr. Trump to you dealing with the situation generally in relation to rates and car distribution. Are there any facts stated by Mr. Trump in that letter which you do not agree with?

A. Yes, indeed.

Q. What are they?

A. I don't agree with that system of furnishing 72 per cent of cars to certain shippers and only 28 per cent to other shippers, and then divide that 28 per cent again among the preferred class. I don't agree with that.

Q. Just what is that system you think; what do you think the system is?

2 A. That system is to take the entire pool of cars on the Pennsylvania Railroad system and first deduct 78 per cent of all the cars we see running—

Mr. LIVERIGHT: 72.

A. 72 and call those assigned cars. Then distribute the remainder amounting to 28 per cent among the independent producer.

By Mr. COLE:

Q. Including the ones favored by the first percentage?

A. A portion of that 28 per cent still going to the preferred shipper. I don't agree with that proposition. That was one of the main troubles that was on the Tyrone Division during this period and no man could operate a mine profitably under such a system.

By Mr. GOWEN:

Q. Do you believe the facts stated in that letter by Mr. Trump, that 72 per cent of the cars which were distributed generally by the Pennsylvania Railroad Company were individual and fuel cars?

A. 45 per cent of them I believe Mr. Trump stated were individual cars. 21 per cent of them were foreign assigned cars. No, 21 per cent were fuel cars and 3 per cent were foreign assigned cars.

Q. Now what do you mean by fuel cars?

A. I understand that the Pennsylvania Railroad Company claim that the system car is a fuel car whenever they choose to give it to some concern whom they have favored with their fuel orders, of which company we were not one.

Q. To be loaded with their own fuel coal?

A. Yes sir.

Q. When you speak of foreign fuel cars what do you mean?

3 A. I understand that the Railroad Company mean when they say foreign fuel car a P. & R. car.

Mr. LIVERIGHT: Mr. Clark of course, is more or less familiar with this proposition, but it is unfair to him to ask him what Mr. Trump meant in a letter he wrote, and we object to the question.

Mr. GOWEN: In that the statement is made so many cars were foreign fuel cars.

Mr. COLE: Foreign cars for supply coal.

Mr. GOWEN: Now those who are conversant with the coal trade know what that kind of car is, and certainly we are entitled to ask Mr. Clark for the enlightment of the jury and Court.

The COURT: I don't know whether he knows or not. He didn't write the letter. If you want to have that letter explained, you can put Mr. Trump on.

Mr. GOWEN: Suppose we find out if Mr. Clark knows what foreign cars for fuel supply were.

Mr. COLE: We object to this as not cross-examination as far as cross-examining him on this letter. Second, it is immaterial what he understands it means. The Court will say what it means eventually, that is for judicial construction and not for a witness to say what some other person's letter says. And third, the witness is not bound to construe the technical terms. It is immaterial whether he is even familiar with them in this case. Certainly, it is not cross-examination.

The COURT: I don't think it is competent to go into that in detail. If you want the letter explained, you will have to put on your own witness, the man that wrote it. Objection sustained, evidence excluded, exception noted for defendant and bill sealed.

4 By Mr. GOWEN:

Q. You have referred to the interruptions that occurred during the period of the action in the mining and shipping of coal and have referred to irregular and inadequate supply of coal cars. What other conditions were there that affected the mining and shipping of coal?

A. We had a strike during that period.

Q. How frequently did you have strikes?

A. We have labor troubles every few years.

Q. I am speaking now of the period of the action?

A. I don't think our mines were interfered with, that is, the operations interfered with because of strikes except during one period. That was from the 1st of April, 1906 to the 16th day of July, 1906.

Q. Is that the only occasion during this period?

A. That is all I recall.

Q. What other difficulties had you?

A. We had the usual difficulties inside and outside of the mine that goes with the mining business, but nothing serious.

Mr. GOWEN: I would like to suspend Mr. Clark's cross-examination until we get those statements.

(Adjournment until 9 A. M.)

* * * * *

5 Q. You said in answer to a question by Mr. Gowen that you had a quarrel with their system of rating. Will you explain whether it was their system you objected to or the application of the system?

A. No sir, we didn't object to the system, but we did object and do object to the manner in which it was applied.

Q. State whether if you had gotten the cars you would have been able to put your commercial shipments up to your physical capacity?

A. Without a doubt.

Q. Under those conditions, applying the system the Railroad Company applied, state whether or not your rating would have been your physical capacity?

A. Yes, it should have been.

Q. Was there any reason that you can state why your commercial shipments did not equal your physical rating, except the shortage in car supply?

A. I know of no reason.

Q. Did you have the coal to mine?

A. Yes, sir.

Q. Did you have the business on which to ship it?

A. Yes, sir.

Q. Did you have the equipment and the force?

A. Well we had the equipment. We never had the force.

Q. Why not?

A. Because our men wouldn't stay. We couldn't keep an organization together.

Q. State whether you have reason to believe that had the car supply been fairly regular you could have gotten a mine force to mine the coal up to your capacity?

A. I would think so.

Q. You stated something about 72 per cent. and 28 per cent. applied to a question from Counsel for defendant. What did you mean thereby?

A. I mean that Mr. Trump stated in his communication to me that 72 per cent. of all their cars, of all their coal cars were assigned cars, 28 per cent. were system cars.

Q. Did your operation enjoy any part whatever of the distribution of the 72 per cent.?

A. None whatever.

6 Q. That is to say, less than one third of the cars distributed were cars in which you enjoyed a distribution?

A. Yes, sir.

Q. State whether or not a new rating was given your mines on or about April 18, 1907?

A. I think that was about the date that a new rating was assigned those mines.

Q. In connection with that rating did you receive a letter from Mr. Trump of the defendant Company?

A. I did.

Q. Under what date?

A. Under date of May 7, 1907.

Q. Do you have the original letter with you?

A. No sir.

A. Have you made search for it?

A. Yes sir. I haven't been able to locate the original.

Q. Do you have a true copy of it there?

A. Yes sir. (Marked Plaintiff's Exhibit No. 28).

Said copy having been marked Plaintiff's Exhibit No. 28 is offered in evidence on part of the Plaintiff.

Q. Read it please?

A. The Pennsylvania Railroad Company, Philadelphia. May 7, 1907. Clark Brothers Coal Mining Company, 1014 Commonwealth Trust Building, Philadelphia. Gentlemen: As requested in letter of Mr. J. O. Clark, dated Supulpa, Indian Territory, May 3, 1907, I give herewith the number of working places and the maximum physical capacity of your Falcon mines on our Tyrone Division as determined by recent examination made by our inspector of mines. Falcon No. 2 mine, 100 working places in low coal or places for 200 miners at 3 tons each, 600 tons. 13 miners working on pillars at 3 tons each, 39 tons. 7 working places in high coal or places for 14 miners at 5 tons each, 70 tons. Maximum physical capacity 709 tons. Falcon No. 3 mine, 24 working places or places for 48 miners. 48 miners at 3 tons each, 144 tons. Falcon No. 4 mine, 27 7 working places or places for 54 miners. 54 miners at 5 tons each, 270 tons. Yours truly, M. Trump, General Superintendent Transportation.

Q. How did that statement or report compare with the report of your own engineer on the same subject?

A. So far as the Falcon No. 2 mines was concerned it was quite a good bit higher.

Q. At what figure did he put it?

A. 600 tons.

Q. And the Railroad Company engineer made it 709?

A. 709, yes sir.

Q. Now was there any material change in the physical ability of Falcon No. 2 to produce coal between October, 1905, and April, 1907?

A. Mr. Miller reports not.

Q. What was the report made to you by your engineer as to the working capacity of No. 3 mine?

A. I believe his report was 125 tons?

Q. In place of 144?

A. I believe his report was 125 tons, I am not quite sure.

Q. In lieu of the 144 given by Mr. Trump, and what was his report on Falcon No. 4, which Mr. Trump rates at 270 tons?

A. My recollection is that it was 275 tons.

Q. State whether as to No. 3 and 4, apart from the car supply, during the period of this action there was any reason why you could not have mined and shipped coal up to the physical capacity designated by Mr. Trump?

A. None that I know of, if we had received a regular supply of cars.

Q. Did you have the trade for them?

A. Yes sir.

Q. State whether or not at your Falcon mines that are involved in this action your Company had sufficient coal in place to have mined and shipped all it claims in this action it was prevented from shipping by reason of the car supply of the defendant Company?

A. There can't be any doubt of that. Our engineer though will give you the acreage.

Q. But in a general way do you know that fact?

A. Yes, I know that we had enough coal and a great deal more.

Q. That is the point, whether it gets down to a margin of a ton or two, as they seem to indicate you didn't have the coal here. Without calling an engineer you know you had an abundance of coal there?

A. I know that, yes.

Q. Mr. Gowen has made an admission of record that it was the practice of the Railroad Company to spike switches. Do you know of any other instance of that kind up in your Indiana County territory or in your Clearfield County territory?

A. I do not, except in the case of the Hillsdale Coal & Coke Company, another company in which we were interested, and I am quite sure on the contrary it never was done on the Cush Creek Branch.

Q. You don't know of it ever having been done with respect to any other owners?

A. I do not, no sir.

Q. What operations on the Horton Run Branch were beyond your Falcons 5 and 6?

A. Indiana No. 8, Indiana No. 2 and Indiana No. 3. Mines owned by the Irish Brothers.

Q. Did you ever know of their switches being spiked?

A. I never did, no sir.

Q. Now was there any occasion, in order to avoid wrecks, to spike this particular switch of yours?

A. In my judgment there was absolutely none.

Q. How could that be guarded against without spiking?

A. By a lock lever thrown over and locked with a pad lock.

Q. Was there such a lock lever and such a pad lock there?

A. Yes sir.

Q. Did you or anybody in your employ have the key to that pad lock?

A. No sir.

Q. Who had that?

A. The conductor carried those keys.

Q. The Railroad Company conductor?

A. Yes sir.

By Mr. GOWEN:

Q. Mr. Clark, with respect to the question of ratings of your mines, is it not a fact that on October 20th, 1906, Mr. Womelsdorf, at your instance, made an examination of the mines in order to determine their physical capacity and made a report to you which showed a physical capacity for Falcon No. 2 mine of 600 tons, at No. 3 of 120 tons and No. 4 of 275 tons?

A. Yes sir, he made such a report.

Q. And that upon the receipt of that report you communicated Mr. Womelsdorf's figures to the Railroad Company and they were adopted by them for the purpose of establishing the ratings which were then established?

A. Yes sir; but Mr. Womelsdorf stated in this report that the rating capacity which he had assigned to these mines was conservatively made.

Q. That is, his estimate of their physical capacity was a conservative estimate?

A. Yes sir.

Q. But in May, 1907, when no change as you say had taken place in the mines which would have increased their capacity, the Railroad Company made an examination through its own inspector and in the case of No. 2 advanced Mr. Womelsdorf's figures from 600 tons to 709 tons. Is that right?

A. They advanced the maximum physical capacity estimate.

Q. In other words, they gave you credit for a larger physical productive capacity than Mr. Womelsdorf gave you as to No. 2?

A. Yes sir.

Q. The same was true at No. 3?

A. Yes sir.

Q. And that at No. 4 they found the same capacity that Mr. Womelsdorf had, 275 tons?

A. Yes sir.

Q. Those were the facts?

A. I believe that was their statement.

Q. Mr. Clark in the letter of Mr. Trump to you, under date of March 6, 1907, which was read to the jury yesterday and which has been referred to by your Counsel, this statement is made: The total ratings of the bituminous mines of all our regions as revised and taking effect February 1st, 1907 are 7211 cars. The total ratings as ascertained by our inspector being 10684 cars. Then that is followed by this statement: The average daily shipments for 12 months ending December 31st, 1906, excluding four months of 1906 when our mines were affected by the strike and including the last four months of 1905 so as to give us 12 months not affected by strike conditions, were 3665 cars. That is the capacity of the mines was 10684 cars a day, the shipments were 3655 cars, about one-third of the maximum capacity of the mines. You don't want the Court and Jury to understand, do you, that if the Railroad Company had furnished cars up to the rated capacity, up to the capacity of its mines,

that is, increased the shipments from 3600 cars to 10,000 cars that all the operators could have marketed their coal, all their output?

11 Mr. COLE: We object to that as immaterial and irrelevant. It isn't a question of what the witness wants the Court and Jury to understand, it is a question of fact we are getting at here.

The COURT: I don't see how that is competent, what his understanding would be.

Mr. GOWEN: I will substitute what his judgment, for his understanding, would be, if there is any disposition to criticize the word understanding. The stenographer will substitute the word judgment.

The COURT: Objection sustained, evidence excluded, exception noted for defendant and bill sealed.

By Mr. LIVERIGHT:

Q. This letter of Mr. Trump's states that the revised and effective rates of all their regions were 721 cars as of February 1st, 1907, and that their shipments, that is their daily average shipments were 3665 cars, or a little over 50 per cent of the adopted ratings. Mr. Trump's later letter to you says that Falcon No. 2 adopted rating of physical capacity was 709 tons a day. If shipments amounting to 50 per cent of 709 tons a day had been added to the adopted per diem rating and the total divided by two, what would have been the effective rating of No. 2 mine?

Mr. GOWEN: I object to that question because it misstates the letter of Mr. Trump. It was 52.8 per cent not of the capacity but of the adopted ratings.

By Mr. LIVERIGHT:

Q. Make that the adopted per diem physical output?

A. The rating would have been 531 tons.

Q. 531 tons a day?

A. Yes sir.

12 Q. Was the rating as high as that figure at any time during the period of this action?

A. No sir.

Q. What was the maximum rating given the mine at any time during the action?

A. The maximum rating of Falcon No. 2 was 13 cars.

Q. And what was the minimum for that same mine during this period?

A. The minimum was 9 cars.

Q. Of how many tons?

A. I believe it was 35 tons.

Q. 35 net tons?

A. 35 net tons.

Q. When was the 13 cars per diem rating adopted for No. 2?

A. My recollection is that it was about the 18th of April 1907.

* * * * *

- 13 JACOB H. MILLER called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

- Q. Where do you live?
A. Smoke Run.
Q. What is -our business?
A. Mine Superintendent for Clark Brothers Coal Mining Co.
Q. Do you have charge of Falcon mines 2, 3 and 4?
A. Yes sir.
Q. How long have you been connected with them?
A. Ever since the Company purchased the mines.
Q. Were you connected with either of these mines before this Company took hold of it?
A. 2 and 3, yes sir.
Q. For whom?
A. Before Clark Brothers Coal Mining Company had charge of it.
Q. For whom were you in charge of it?
A. For W. F. Jacoby & Company, and also for Penn Collieries Company previous to Jacoby.
Q. What were your duties under Jacoby and Clark Brothers Coal Mining Company?
14 A. As Superintendent of the mines.
Q. Did you visit the mines?
A. Yes sir.
Q. Supervised the preparation of the coal?
A. Yes sir.
Q. How often did you go to each mine?
A. Very near every day.
Q. How far apart were these mines?
A. 2 and 3 were 10 miles apart. Take the train you know.
Q. Which was the largest mine?
A. No. 2.
Q. Were they all on the same vein of coal?
A. Yes sir.
Q. What vein?
A. The "D" or Moshannon vein.
Q. In 1905 what was the physical capacity of No. 2?
A. 600 tons.
Q. No. 3?
A. I think it was 125.
Q. No. 4?
A. No. 4 was January 1st 275.
Q. Were these mines equipped and improved so that they could have produced the tonnage that you have just testified to as their output?
A. Yes sir.
Q. State how they were equipped?
A. Falcon No. 2 was equipped with electrical haulage.
Q. How many cars did it have?
A. 137 mine cars.

- Q. What size?
A. Standard of ton two.
- Q. How many places did it have?
A. It had about 100 places.
- Q. How many men could work in each of them?
A. Two men to a place.
- 15 Q. How many tons per day could a man produce?
A. We always figured on 3 tons a day, which was conservative.
- Q. How many rooms did you say?
A. 100.
- Q. Did that include pillar workings?
A. Yes, some of it included pillars.
- Q. Well in October, 1905, how many men could have found places in No. 2 mine in which to produce 3 tons per day each?
A. We could have placed easily 200 men and it was conservative at that.
- Q. How many working places were there in No. 3?
A. I think there was 24 working places at that time, to the best of my recollection.
- Q. How much per day would each man produce there?
A. Well we generally figured on about the same there, 3 tons to the man.
- Q. How many men could have been employed there?
A. About 48.
- Q. And the productive capacity of the mine would have been how much a day?
A. 145 that mine, or 144.
- Q. At No. 4 how many working places were there?
A. I think there was about 27.
- Q. How many tons per day could you have produced at No. 4?
A. 275.
- Q. State whether or not you had equipment and improvements at Nos. 3 and 4 to produce the tonnage you say was the daily capacity of these mines?
A. Yes sir, we had.
- Q. Of what did that equipment consist?
A. Of mine cars and mules.
- Q. How many of each?
16 A. We had at No. 3 I think it was 24 mine cars and at No. 4 we had about 40, to the best of my recollection now at that time.
- Q. How many mules?
A. At No. 3 we had two mules and at No. 4 we had three, that is at the time, but we changed mules from one mine to the other as we needed them.
- Q. Did you have any mules at No. 2?
A. No sir, never had any mules there.
- Q. What was the efficiency of that motor that you had?
A. First class.
- Q. How many empty bank wagons could you haul into the mine per trip?

A. Well we hauled as high as 36 in a rush.

Q. Was the haul from the mines to the tipple in favor of the load or otherwise?

A. In favor of the load.

Q. How many wagons would you bring down that way each trip?

A. I have hauled 46 on one trip but it is very seldom we could get a full trip.

Q. State whether or not you had tipple capacity at No. 2 to load 600 tons a day?

A. Yes sir, we did.

Q. How was the tipple equipped?

A. We had it equipped with a Phillips Automatic Tipple.

Q. Did you have a tipple capacity at No. 3 and 4 to load the tonnage you say was the capacity of those mines?

A. Yes sir, we did.

Q. State whether or not these several mines had in place the coal sufficient day in and day out to have produced these tonnages throughout the period of this action from October 1905 to May 1st 1907?

A. It did.

17 Q. Do you know whether the Coal Company had orders or contracts, or both, upon which to apply the coal you say the mines could have produced?

A. Yes sir, I always had sufficient orders for all the coal we could produce.

Q. State whether or not any of these orders were cancelled?

A. Yes sir, quite a number of them.

Q. Do you know the reason?

A. Because we could not get cars.

Q. Well then did or did not these mines under your superintendency produce the tonnage you say they were capable of during the period of this action?

A. We did not produce the tonnage they were capable of.

Q. Why not?

A. Because we didn't get the cars.

Q. In other words, you required railroad cars in which to ship the coal?

A. Regularly, yes sir.

Q. What efforts, if any did you make to get cars?

A. Made about every effort that we know of to get cars.

Q. Did you personally try to get them?

A. Yes sir.

Q. Well what call or demand did you make upon the Pennsylvania Railroad Company to give you a car supply?

A. Daily requisition.

Q. From where?

A. From my office to Mr. Johnston at that time.

Q. Who is Mr. Johnston?

A. He was Superintendent of the Tyrone Division at Tyrone.

Q. How did you put in these requisitions?

A. By telephone or mail.

18 Q. How often did you do that?

A. Daily.

Q. What time of day?

A. Always went out in the evening mail, leaving Smoke Run about 5.30, for cars wanted the following day.

Q. When you say you telephoned or mailed, do you mean you adopted or used both methods at the one time?

A. No, not during that period. If we telephoned, we didn't order by mail.

Q. To whom would you telephone?

A. To Mr. Johnston.

Q. At Tyrone?

A. Yes sir.

Q. And to whom would you write?

A. To Mr. Johnston.

Q. At any time during this action did you make demands for cars at any other place only at Tyrone?

A. Only to Mr. Clark, at the main office. They took it up with the Railroad people, as I understand.

Q. You never asked for them at Osceola?

A. No sir, the cars was not distributed at Osceola at that time.

Q. Did you get the cars you asked for?

A. No sir.

Q. Did you get any considerable proportion or percentage of those you asked for?

A. A small proportion at times and lots of times none at all.

Q. Did Clark Brothers Coal Mining Company have cars of their own?

A. No sir.

Q. Did the Company have any other source of car supply except the Pennsylvania Railroad Company?

A. It had not.

Q. If the Pennsylvania Railroad Company declined or neglected or refused to supply cars in which to ship your coal was there any other way in which you could send the coal out to the consumer or customer?

19 A. There was not.

Q. State whether or not there was any other railroad connection with these mines by which your coal could have been shipped?

A. There was not.

Q. Are the mines of the Berwind-White Coal Mining Company situated close to your mines?

A. Yes sir.

Q. How far away are Eurekas 7, 16, 22, 27 and 28?

A. Eureka 27 switch, or the two switches Falcon 2 and Eureka 27 switch I should judge are about 1000 feet apart, and that of 16 probably in the neighborhood of 2000 feet where the switch goes off into the mine.

Q. And the other Eureka mines are more remote, are they?

A. Yes sir.

Q. Where is Standard No. 7?

A. On the Chesterfield Branch.

Q. How far from Falcon 2?

A. About two miles, that is across the hill.

Q. Do you know who owned that?

A. It was owned at that time by the Banion Run Coal Company.

Q. Who later became the owner and operator?

A. Mr. L. W. Beyer.

Q. What kind of cars were loaded there?

A. Berwind-White. To the best of my recollection during this entire period there was Berwind-White cars loaded.

Q. State what kind of a car supply was allotted or enjoyed by the Berwind-White mines that were competitive with the Falcon mines?

A. They always seemed to have their side track full of cars.

20 Q. What kind of cars?

A. Pennsylvania cars and their individual cars.

Q. Both classes?

A. Yes sir.

Q. Was that an occasional occurrence?

A. No sir, a regular occurrence.

Q. State whether or not at times when your mines had no cars the Berwin mines had a good supply of cars?

A. Yes sir, they did.

Q. Was that occasional or frequent?

A. Frequent.

Q. State whether or not at times when your mines had no cars at all there were any Pennsylvania Railroad cars moving along the Branch that were distributed elsewhere?

A. Yes sir, there was.

Q. Was that occasional or frequent?

A. Well that was frequent.

Q. State whether or not it was an every day occurrence for Pennsylvania Railroad cars to be distributed along this Branch?

A. Yes sir.

Q. Was that apart from the private cars?

A. Yes, daily there was Pennsylvania cars come up in that region.

Q. State whether or not you daily for each of these mines, of which you were Superintendent, made requisition for cars?

A. To the best of my knowledge I made it daily.

Q. For Falcons 2, 3 and 4?

A. 2, 3 and 4.

Q. What were the ratings of your mines during this action?

A. At the time Clark Brothers acquired the mines Falcon No. 2 was rated 450 tons. That was on October 15th, 1905. Some time

21 in December it was increased to 9 cars per day, which would be counting 35 tons to a car. Some time in December 1905

it was reduced to 315 tons or it was rated at 9 cars per day, counting 35 tons to the cars would be 315 tons. In the following year, in December 1906, Falcon No. 2 was increased again to 10 cars, which would be 350 tons, and it remained at that during the balance

of the period of this action. But shortly after it was increased again to 13 cars in the following May, 1907.

Q. At the close of this action?

A. At the close of this action it was increased again to 13 cars.

Q. Now what were the several ratings of No. 3?

A. No. 3 at the time Clark Brothers took over the mines was 100 tons per day. In December, 1905, it was reduced to one car. The following year, December 1906, it was increased again to 2 cars.

Q. And May, 1907, what was it?

A. The same, two cars. Now Falcon No. 4 was rated in January, 1906, and given two cars a day. December, 1906, it was increased to 4 cars a day, and the following May, 1907, it was increased to 5 cars a day.

Q. Was there any reason that you know of why the rating of No. 2 should have been reduced between October, 1905, and December 1905 from 450 to 315 tons a day?

A. I know of no reason whatever.

Q. Was the mine just as capable of producing coal at the later date as the earlier?

A. Just as capable, in fact more so, if anything, as far as development is concerned.

Q. Was there any material physical change in No. 2 mine between the period when it was rated by the Railroad Company at 9 cars a day and when it was rated at 13 cars?

A. No sir.

Q. State whether or not it was just as capable of producing your maximum output at the earlier as at the later period?

A. It was.

22 Q. Have you as Superintendent kept a record of the cars received day by day at the mines which you superintended?

A. Yes sir.

Q. Does this record show the number of cars received and shipped, time idle and time worked?

A. Yes sir.

Q. Where do you have that record?

(Witness produces books.)

Q. From what source did you make up these monthly reports?

A. From the daily mine reports made to the Philadelphia office, the main office.

Q. Who made those reports?

A. I made those myself.

Q. From whom did you get the information to put on to the mine reports?

A. From the mine foremen at the mines.

Q. Well what was shown thereon?

A. It showed the number of cars received, the number of cars loaded, the number of hours worked and the number of hours idle, either worked or idle.

Q. Did you check up these items?

A. Yes sir, I did. I copied the summary from the original reports.

Q. Yourself?

A. Yes sir.

Q. Do you have a water copy of these summaries?

A. Yes sir, I have.

Q. Refer to Falcon 2, beginning October 16, 1905, how many cars were received on the 16th?

A. On the 16th we received 6 foreign wooden cars and one Pennsylvania steel.

Q. Just give the totals?

A. 7 cars.

23 Q. On the 17th?

A. 4 cars. Now I am including steels and wooden cars.

Q. On the 18th?

A. 11 cars.

Q. On the 19th?

A. 5 cars.

By Mr. GOWEN:

Q. Are you counting steel as one car?

A. In this here I am counting everything a car. At the totals it is reduced. I can give you the items for each day.

By the COURT:

Q. You are giving the totals instead of as October 16th?

A. Yes sir.

By Mr. LIVERIGHT:

Q. On the 20th?

A. Nothing.

Q. On the 21st?

A. Nothing.

Q. On the 23rd?

A. Nothing.

Q. On the 24th?

A. Nothing.

Q. Were you working from the 26th to the 30th?

A. No sir.

Q. How was the car supply during that time?

A. The car supply was running poor during those days.

Q. Was the mine shut down?

A. Yes sir, we shut down there for four days.

24 Q. November give us car receipts day by day?

A. November 1st, 5 cars. November 2nd, one car. November 3rd, 7 cars. November 4th, 5 cars. November 5th was Sunday. The 6th, 5 cars. The 7th, 5 cars. The 8th, 11 cars. The 9th nothing. The 10th, 2 cars. The 11th nothing. The 12th was Sunday. The 13th nothing. The 14th, 2 cars. The 15th nothing. The 16th nothing. The 17th, 4 cars. The 18th nothing. The 19th was Sunday. The 20th, 6 cars. The 21st, 6 cars. The 22nd nothing. The 23rd, one car. The 24th nothing. 25th, 4 cars. The

26th was Sunday. The 27th nothing. The 28th, 3 cars. The 29th nothing. The 30th nothing.

Q. How many periods were you idle there?

A. From the 11th to the 14th we were idle 3 days in succession.

Q. From the 11th to the 20th?

A. From the 11th to the 20th we worked 9 hours.

Q. What was that due to?

A. No cars.

Q. How about the 29th and 30th?

A. And then again on the 22nd, 23rd and 24th we were idle 3 days in succession. Again on the 29th and 30th we were idle 2 days in succession.

Q. What was the cause of this idleness?

A. No cars.

Q. State whether cars had been ordered?

A. Yes sir, to the best of my knowledge they were ordered daily.

Q. Take up December, 1905?

A. The same way?

Q. The same way.

A. December 1st we received 2 cars. December 2nd nothing. December 3rd was Sunday. The 4th, 6 cars. The 5th nothing. The 6th, 3 cars. The 7th nothing. The 8th nothing. The 9th, nothing. The 10th was Sunday. The 11th, 4 cars. The 12th, 2 cars. The 13th nothing. The 14th, 3 cars. The 15th nothing. The 16th nothing. The 17th was Sunday. The 18th, 4 cars. The 19th, 7 cars. The 20th, 10 cars. The 21st nothing. The 22nd nothing. The 23rd nothing. The 24th was Sunday. The 25th a holiday. On the 26th we received 5 cars. The 27th, 4 cars. On the 30th, 5 cars.

Q. Any on the 28th and 29th?

A. No sir.

Q. How much were you idle that month, on successive days I mean?

A. On the 7th, 8th and 9th we were idle 3 days in succession. On the 15th and 16th we were idle 3 days there in succession. We received cars on the day after Sunday there, what was it? The 15th, 16th and 18th. We received 4 cars but they were not received until the afternoon, consequently we were idle that day. 3 days in succession.

Q. Do these days of idleness comprise the entire day or parts of days?

A. Entire day.

Q. In addition thereto have you any idle parts of days?

A. Yes sir, quite a number.

Q. What was the cause of this idleness?

A. No cars.

Q. How many cars were received, summarizing the period from October 16th, 1905 to December 31st, 1905?

A. We received 158 cars.

Q. How many of those were steel cars?

A. 48 and 100 single cars.

- Q. At what figure were steel cars then rated?
A. 2 cars for a steel.
- Q. Do you know whether that changed, that rating of steel cars?
A. No sir.
- Q. Wasn't it made one and one-half?
A. Not in 1905. It changed in 1906 I understand.
- 26 Q. In January, 1906?
A. It changed to a car and a half.
- Q. Give us January, 1906, the same way?
A. January 1st, 4 cars.
- Q. That was a legal holiday, was it?
A. It is on here marked as 4 cars. They might have been put in the night before. January 4th, one car.
- Q. How about January 2nd and 3rd?
A. January 2nd nothing. January 3rd nothing. The 4th, one car. The 5th nothing. The 6th nothing. The 7th was Sunday. The 8th, 7 cars. The 9th, 10 cars. The 10th nothing. The 11th nothing. The 12th nothing. The 13th nothing. The 14th was Sunday. The 15th, 3 cars. The 16th, 3 cars. The 17th nothing. The 18th, 3 cars. The 19th nothing. The 20th nothing. The 21st was Sunday. The 22nd, 2 cars. The 23rd, 4 cars. The 24th, 2 cars. The 25th, 8 cars. The 26th, 3 cars. The 27th, 2 cars. The 28th was Sunday. The 29th, 3 cars. The 30th, 5 cars.
- Q. The 31st?
A. Nothing.
- Q. What was your total for the month?
A. 60 cars.
- Q. How much work did you do at the mine between the 10th and 18th of January?
A. Worked 9 hours from the 10th to the 18th.
- Q. Why didn't you work more?
A. Had no cars.
- Q. February, 1906?
A. And again idle on the 18th and 19th. February 1st nothing. The 2nd, one box car. The 3rd nothing. The 4th was Sunday. The 5th 9 cars. The 6th, 3 cars. The 7th, 3 cars. The 8th, 5 cars. The 9th nothing. The 10th, 4 cars. The 11th was Sunday. The 12th, 3 cars. The 13th, 7 cars. The 14th, 3 cars. The 15th nothing. The 16th, 5 cars. The 17th nothing. The 18th was Sunday. The 19th, 12 cars. The 20th nothing. The 21st nothing. The 22nd nothing. The 23rd, 2 cars. The 24th, one car. The 25th was Sunday. The 26th, 6 cars. The 27th, 3 cars. The 28th, 9 cars. The 29th nothing. That is only 28 days in it, making total of 76 cars.
- 27 Q. March?
A. March 1st, one car. The 2nd, 5 cars. The 3rd, nothing. The 4th was Sunday. The 5th, 5 cars. The 6th nothing. The 7th nothing. The 8th, 15 cars. The 9th, nothing. The 10th, 5 cars. The 11th was Sunday. The 12th, 4 cars. The 13th nothing. The 14th nothing. The 15th, 6 cars. The 16th nothing. The 17th nothing. The 18th was Sunday. The 19th, nothing.

The 20th, 4 cars. The 21st, nothing. The 22nd, one car. The 23rd nothing. The 24th, 3 cars. The 25th was Sunday. The 26th, 4 cars. The 27th, one car. The 28th nothing. The 29th, 5 cars. The 30th, 4 cars. The 31st nothing.

Q. Total?

A. 63 cars in the month of March.

By Mr. LAUGHLIN:

Q. That total is just car for car?

A. That is car for car. April, May, June and July there was no account taken, during the strike period.

By Mr. LIVERIGHT:

Q. The mine was shut down, was it?

A. Yes, sir.

Q. August, 1906?

A. August 1st, 4 cars. The 2nd, 2 cars. The 3rd, 2 cars. I had the wrong column, it is a little blurred here.

Q. How many on the 3rd?

A. I will start on the first again. August 1st, 4 cars. The 2nd, 2 cars. The 3rd nothing. On the 4th, 4 cars. The 5th was Sunday. On the 6th nothing. The 7th nothing. The 8th, 3 cars. The 9th, one car. The 10th, 4 cars. The 11th, 3 cars. The 12th was Sunday. The 13th, 3 cars. The 14th, 7 cars. The 15th nothing. The 16th, 2 cars. The 17th, 4 cars. The 18th nothing. The 19th was Sunday. The 20th, 2 cars. The 21st, 3 cars. The 22nd nothing. The 23rd nothing. The 24th, 3 cars. The 25th nothing. The 26th was Sunday. The 27th, 6 cars. The 28th, 4 cars. The 29th nothing. The 30th, 3 cars. The 31st nothing. Total of 57 cars.

Q. How much did you work between the 17th and 27th?

A. 15 hours.

Q. In the 10 days?

A. Yes, sir.

Q. September?

A. September 1st, 2 cars. September 2nd was Sunday. The 3rd nothing. The 4th, 5 cars. The 5th, 6 cars. The 6th, 4 cars. The 7th nothing. The 8th nothing. The 9th was Sunday. The 10th, 3 cars. The 11th, 3 cars. The 12th nothing. The 13th, 5 cars. The 14th, 2 cars. The 15th, 4 cars. The 16th was Sunday. The 17th nothing. The 18th one car. The 19th, 3 cars. The 20th, one car. The 21st nothing. The 22nd nothing. The 23rd was Sunday. The 24th, 4 cars. The 25th, 2 cars. The 26th, 2 cars. The 27th, 4 cars. The 28th nothing. The 29th nothing. The 30th was Sunday. Making a total of 51 cars.

Q. October?

A. October 1st, 5 cars. The 2nd, 4 cars. The 3rd, 2 cars. The 4th, 2 cars. The 5th nothing. The 6th, 3 cars. The 7th was Sunday. The 8th, 2 cars. The 9th, 3 cars. The 10th, 4 cars. The 11th, 2 cars. The 12th nothing. The 13th nothing. The 14th was Sunday. The 15th, 2 cars. The 16th nothing.

The 17th nothing. The 18th nothing. The 19th nothing. The 20th, 3 cars. The 21st was Sunday. The 22nd, 3 cars. The 23rd, 3 cars. The 24th nothing. The 25th, nothing. The 26th, 3 cars. The 27th, 3 cars. The 28th was Sunday. The 29, 29th, 3 cars. The 30th, 2 cars. The 31st, 3 cars. Making total of 52 cars.

Q. Between the 11th and 20th how many hours did you work?

A. 9 hours.

Q. As I understand it, during this period your rating as fixed by the Railroad Company, I mean the adopted rating was either 9 or 10 cars, wasn't it?

A. 9.

Q. Now if you had received 9 cars a day for each working day, how many should you have had?

A. For the entire month?

Q. For that month, yes?

A. We should have had 234 cars.

Q. And you got how many?

A. Counting steels as one and one-half car we got $69\frac{1}{2}$ cars. We should have had $164\frac{1}{2}$ more. Counting 26 working days of 9 cars.

Q. Go through November the same way?

A. November 1st 4 cars. The 2nd 4 cars. The 3rd 3 cars. The 4th was Sunday. The 5th 5 cars. The 6th one car. The 7th 6 cars. The 8th nothing. The 9th nothing. The 10th 3 cars. The 11th was Sunday. The 12th 2 cars. The 13th nothing. The 14th nothing. The 15th 2 cars. The 16th nothing. The 17th nothing. The 18th was Sunday. The 19th 4 cars. The 20th 3 cars. The 21st 3 cars. The 22nd 2 cars. The 23rd one car. The 24th nothing. The 25th was Sunday. The 26th 3 cars. The 27th 5 cars. The 28th 6 cars. The 29th was Thanksgiving, a holiday. The 30th 3 cars. Making a total of 60 cars.

Q. How much work was done at the mine between the 10th and 19th?

A. 13 hours.

Q. Proceed with December?

30 A. December 1st nothing. The 2nd was Sunday. The 3rd 3 cars. The 4th 2 cars. The 5th nothing. The 6th 2 cars. The 7th nothing. The 8th 2 cars. The 9th was Sunday. The 10th 5 cars. The 11th 3 cars. The 12th 2 cars. The 13th 3 cars. The 14th 3 cars. The 15th one car. The 16th was Sunday. The 17th 5 cars. The 18th nothing. The 19th one car. The 20th nothing. The 21st 4 cars. The 22nd 2 cars. The 23rd was Sunday. The 24th 4 cars. The 25th was a holiday, Christmas. The 26th nothing. The 27th 3 cars. The 28th 3 cars. The 29th 5 cars. The 30th was Sunday. The 31st one car. Making a total of 54 cars.

Q. What was your rating at that time, December 1906?

A. 10 cars.

Q. If you received cars up to your adopted rating as fixed by the Railroad Company, how many should you have had that month?

A. Should have had 250 cars.

Q. And you got how many?

A. We received 65.

Q. How much were you short?

A. 185.

Q. Do you have the receipts for the year 1906 totalled?

A. Yes sir.

Q. Let us have the total?

A. Total for January was 60 cars, February 76, March 63, April, May, June and July are out, August 57, September 51, October 52 November 60, December 54, making total of 473 cars.

Q. Counting steels at one and one-half what would your total be?

31 A. During that year I have them counted here as two cars.

Q. That is in making up this summary you were under the impression the steel cars were counted as two?

A. During 1906?

Q. Have you found out different since?

A. I have seen a notice by the railroad it took effect in 1906 instead of 1907.

Q. Then they were counted a car and one half?

A. When I made this summary I was under the impression it was two cars to a steel.

Q. Will you change that summary?

A. I will change it. It will just take me a minute. That would make a total of 279 single cars received and 194 steels, counting a steel as a car and a half would make 291, making a total of 570 cars received during the year.

Q. During 1906?

A. During 1906.

Q. How many days were you idle during that year?

A. We were idle 605 hours, making 75% days idle during that year.

Q. That is during the eight months, is it?

A. Yes sir.

Q. Or an average of over 9 days to the month you were idle?

A. Yes sir.

Q. Due to what cause?

A. No cars.

Q. January, 1907, go over that day by day and give the total of cars received?

A. January 1st was a holiday, 3 cars received. They were put in the night before I presume. January 2nd nothing. The 3rd 4 cars. The 4th nothing. The 5th nothing. The 6th was Sunday. The 7th 8 cars. The 8th nothing. The 9th 5 cars. The 10th nothing. The 11th 4 cars. The 12th nothing. The 13th Sunday. The 14th 9 cars. The 15th nothing. The 16th 2 cars. The 17th 2 cars. The 18th one car. The 19th 2 cars. The 20th was Sunday. The 21st 3 cars. The 22nd 4 cars. The 23rd 3 cars. The 24th 2 cars. The 25th nothing. The 26th 5 cars. The 27th was Sunday. The 28th 6 cars. The 29th 6 cars. The 30th 5 cars. The 31st 3 cars. Making a total of 77 cars.

Q. February?

A. February 1st 4 cars. The 2nd 5 cars. The 3rd was Sunday.

The 4th nothing. The 5th nothing. The 6th nothing. The 7th nothing. The 8th nothing. The 9th nothing. The 10th was Sunday. The 11th one car. The 12th 3 cars. The 13th one car. The 14th nothing. The 15th nothing. The 16th 3 cars. The 17th was Sunday. The 18th 3 cars. The 19th 8 cars. The 20th 2 cars. The 21st 7 cars. The 22nd 5 cars. The 23rd nothing. The 24th was Sunday. The 25th 7 cars. The 26th 6 cars. The 27th 9 cars. The 28th nothing. Making a total of 64 cars.

Q. In the 13 days from the 5th to the 18th of the month how much work did you do at the mine?

A. Working 13 hours from the 5th to the 18th.

Q. To what cause was that due?

A. No cars.

Q. March 1907?

A. March 1st nothing. The 2nd nothing. The 3rd was Sunday. The 4th nothing. The 5th 11 cars. The 6th nothing. The 7th nothing. The 8th 3 cars. The 9th 3 cars. The 10th was Sunday. The 11th 8 cars. The 12th 9 cars. The 13th 2 cars. The 14th 2 cars. The 15th nothing. The 16th 3 cars. The 17th was Sunday. The 18th 11 cars. The 19th nothing. The 20th nothing. The 21st nothing. The 22nd 2 cars. The 23rd 3 cars. The 24th nothing. The 25th 5 cars. The 26th 5 cars. The 27th 9 cars. The 28th nothing. The 29th nothing. The 30th nothing. The 31st Sunday.

Q. Total?

A. 76 cars.

Q. April 1907?

33 A. April 1st nothing. The 2nd nothing. Hold on, I am mistaken, I have the wrong column. April 1st 8 cars. The 2nd 8 cars. The 3rd nothing. The 4th 5 cars. The 5th 4 cars. The 6th nothing. The 7th was Sunday. The 8th 4 cars. The 9th nothing. The 10th nothing. The 11th 12 cars. The 12th nothing. The 13th nothing. The 14th was Sunday. The 15th 6 cars. The 16th 3 cars. The 17th 4 cars. The 18th nothing. The 19th 3 cars. The 20th 4 cars. The 21st Sunday. The 22nd 5 cars. The 23rd 2 cars. The 24th nothing. The 25th 6 cars. The 26th 5 cars. The 27th 3 cars. The 28th was Sunday. The 29th 5 cars. The 30th 4 cars. Total of 91 cars.

Q. Do you have the receipts for the four months of 1907 covered by the action summarized?

A. Yes sir.

Q. Give them please.

A. Single cars received 177. Steel cars received, counting one and one-half car to a steel, $196\frac{1}{2}$, making a total of $173\frac{1}{2}$. $3\frac{1}{2}$ cars was carried over.

Q. I don't understand your calculation, Mr. Miller. Isn't it total 370 some?

A. $373\frac{1}{2}$. I thought I said 300. I made a mistake.

Q. What period were you idle in those four months?

A. We was idle 254 hours or $31\frac{6}{8}$ days.

Q. Not idle quite as much as in the preceding year in proportion?

A. No sir.

Q. Now take your reports for No. 3 mine. We won't go over this so much in detail but we will ask leave to file the summaries. Have you found your record?

A. Yes sir.

Q. Beginning October 16th, 1905, between that and the 31st how many cars did you receive all told at this mine?

A. 4.

Q. In 15 days?

A. Yes sir.

34 Q. How many days in succession were there that you received no cars?

A. 2 days, the 16th and 17th and the 20th we laid idle, and four days the 24th, 25th, 26th and 27th, 4 days in succession there.

Q. Were you idle on the 29th or 30th?

A. No, we worked.

Q. The 29th was Sunday I believe?

A. Yes, the 29th was Sunday.

Q. November, were you ready to work right along during the month of November, 1905?

A. Yes.

Q. How many days were there on which you received cars in that month?

A. 4 days.

Q. And what was the total number of cars you got?

A. 4 cars.

Q. December, 1905, were you prepared to load and ship coal during that month?

A. Yes sir.

Q. How many days were there that you got any cars?

A. 3 days.

Q. How many cars did you get?

A. 3 cars.

Q. What successive periods of idleness did you sustain in that month?

A. The fore part of the month 7 days in succession, and we were idle again from the 19th to the 25th.

Q. 6 days?

A. Yes sir, and idle the 28th or 29th and 30th, two days.

Q. State whether cars were ordered for this mine?

A. Yes sir.

Q. Now in those three months that I have just gone over how many full days were worked?

A. In 3 months we worked 30 days.

35 Q. And how many days and parts of days were you idle?

A. We was idle 36 days.

Q. January, 1906. How many days in that month were there on which you received any cars in this mine?

A. 5 days.

Q. And what was the total of cars received on those 5 days?

A. 7 cars.

Q. Do you know whether cars were ordered?

A. Yes sir.

- Q. February, on how many days were cars received?
A. 9 days.
- Q. And how many cars were there?
A. 9 cars.
- Q. March, how many cars were received?
A. 8 cars.
- Q. On how many separate days?
A. 7 days.
- Q. Were there any protracted periods of idleness in that month?
A. Yes sir, we were idle 8 days in succession from the 14th to the 22nd.
- Q. Did you have any cars?
A. No sir.
- Q. August, 1906, how many cars did you receive?
A. 7 cars.
- Q. On how many different days?
A. 5 days.
- Q. Were there any protracted periods of idleness?
A. We were idle two days from the 7th to the 8th, and five idle days from the 20th to 25th.
- Q. In addition to that were you idle parts of days?
A. Yes sir.
- Q. September, 1906?
A. We received 9 cars.
- 36 Q. On how many different days?
A. Seven days.
- Q. October?
A. We received 8 cars.
- Q. On how many different days?
A. 6 days.
- Q. Were there any protracted periods of idleness during this month?
A. 3rd and 4th, two days, and we were idle from October 12th to October 22nd.
- Q. Consecutively?
A. Yes sir.
- Q. And other periods of idleness?
A. 22nd and 23rd, two days in succession. And from the 27th to the 31st, one day was Sunday in that.
- Q. What was the cause of that 10 days stretch of idleness?
A. No cars.
- Q. November, 1906, how many cars received?
A. We received 11 cars.
- Q. On how many different days?
A. 9.
- Q. Were there any long periods of idleness that month?
A. From the 14th to the 21st, seven days. And from the 29th to the 30th, two days.
- Q. December, 1906, how many cars did you get?
A. 7 cars.
- Q. On how many different days?

A. 7 days.

Q. A car each of those seven days?

A. Yes sir.

Q. What were the adopted ratings of the Railroad Company given this mine in December, 1906?

A. 2 cars.

37 Q. A day?

A. Yes sir.

Q. If it had received its adopted rating each day how many cars should you have gotten?

A. 50.

Q. And you got how many?

A. 7.

Q. Short?

A. 43.

Q. Do you have these car receipts summarized for the year 1906 in Falcon 3?

A. Yes sir.

Q. Give the summary?

A. I will make the change the same as I did in No. 2, counting steel one and one-half cars. I have them calculated at two cars. We received $8\frac{1}{2}$ cars.

Q. During the 8 months work of the year?

A. Yes sir.

Q. January, 1907, how many cars did you get?

A. 7 cars.

Q. On seven different days?

A. Yes sir.

Q. February, 1907?

A. 7 cars.

Q. How many days?

A. On 7 days.

Q. How long were you idle at a stretch there?

A. 9 days from the 6th to the 16th.

Q. March, 1907?

A. We received 12 cars.

Q. April 1907?

A. 7 cars.

Q. Do you have a summary of the car receipts for those four months?

A. Yes sir.

38 Q. Counting steel cars as one and one-half, how many did you receive all told in the four months?

A. 47.

Q. 47?

A. No, 46. One car was received on December 30th, which was carried over to the next month.

Q. How many days were you idle?

A. 46.

Q. In the four months?

A. It is blurred a little bit. I think that is 46 though.

Q. Now for the whole period covered by this suit how many full days were there that were worked?

A. 191 $\frac{4}{8}$ were worked.

Q. How much were you idle?

A. 183 $\frac{4}{8}$.

Q. What length days are these you calculate?

A. 8 hours I have calculated them.

Q. Has that been the basis of your calculation throughout, the eight hour day?

A. Yes sir.

Q. Was that the rule that was in force at your mines?

A. Yes sir, generally considered 8 hours.

Q. Refer to your Falcon No. 4 records. How many cars were received in January 1906?

A. 34.

Q. What periods of idleness were there?

A. We worked 6 hours from the 1st to the 8th. We were idle four days in succession from the 21st to the 25th.

Q. Now give the car receipts at this mine month by month together with the periods of idleness shown on your records, without my putting questions to you as to each particular month?

A. The entire period?

Q. Month by month?

A. January 1st a holiday.

39 Q. No, you don't understand my question. You have given January. Now give the total for each month, starting with February, together with the total idleness each month without my putting specific questions to you?

A. In February, that is blurred a little, I think it is 17. 17 cars. We were idle 4 days in succession from the 1st to the 5th. From the 9th to the 19th. We worked 25 hours during that period. From the 1st to the 19th we worked 29 hours. Then we were idle $2\frac{1}{2}$ days in succession from the 23rd to the 25th.

Q. Proceed with March?

A. March we received 19 cars. We were idle 2 days in succession, the 1st and 2nd. We were idle 6 days in succession commencing on the 16th. We were idle 2 days in succession on the 25th and 26th, and two days the 29th and 30th.

Q. September?

A. September we didn't resume again until the 17th of September.

Q. How many cars?

A. It is blurred. I think that is 9 there. I will add it up. 9 cars. We worked 12 hours from the 17th to the 23rd.

Q. October?

A. We received 16 cars. We were idle from the 10th to the 22nd of October. We were idle 3 days in succession commencing with the 23rd.

Q. November?

A. We received 23 cars. Idle 2 days on the 5th and 6th I think it is and idle 3 days commencing on the 14th. Idle 4 days com-

mencing the 22nd. December we received 38 cars. We were idle 3 days in succession commencing the 7th. We were idle on the 12th and 13th, 2 days in succession. We were idle on the 20th and 21st, 2 days in succession.

Q. Have you a summary for the year?

40 A. Yes sir. We received 188 cars during the year 1906.
188½.

Q. Now how many days were you idle that year, or rather the 8 months in which there was any business?

A. 94¾ days.

Q. In 8 months?

A. Yes sir.

Q. January, 1907, how many did you get?

A. We received 47 cars.

Q. February, 1907, how many did you get?

A. 27 cars. We were idle from the 6th to the 17th.

Q. What was your adopted rating per day as given by the Railroad Company at that time?

A. 4 cars.

Q. 4 cars a day?

A. Yes sir.

Q. If you had received cars up to your adopted rating in February, 1907, how many would you have gotten?

A. 96.

Q. And you received how many?

A. 27. 69 cars short.

Q. Counting the steel cars you got as one and one-half cars, how many would you have received that month?

A. That would be 39½.

Q. And your shortage would have been how much?

A. 56½ cars.

Q. March, 1907, how many did you receive?

A. 48.

Q. Were there any extended periods of idleness that month?

A. Yes, we were idle the 1st and 2nd, and we worked 18 hours from the 12th to the 19th and we were idle, that is blurred but I think it is 5 days in succession.

Q. Later?

A. Yes sir.

41 Q. April, 1907, how many cars did you get?

A. 57.

Q. What were the total receipts at this colliery for the four months of 1907 covered by this action.

A. 241½ cars.

Q. And how many days and parts of days were you idle during the four months?

A. We lost 282 hours or 35 2/8 days.

Q. Was that whole days or counting both whole and parts of days?

A. Both whole and parts? I calculated in hours.

Q. Now during the period this mine worked from January 1906 to April 30th, 1907, how many full days were worked?

A. 139.

Q. And how many parts of days?

A. That 139 I calculated in hours. The number of full days worked was 117 and 38 parts of days.

Q. How many full and part days was the mine idle?

A. The mine was idle 114 full days and 38 part days.

Q. Total of 152?

A. Yes sir.

(Noon recess).

JACOB H. MILLER recalled.

By Mr. LIVERIGHT:

Q. When did you begin a system of ordering cars by letter?

A. Well that was in vogue for a long time prior to this. I know when I was appointed Superintendent in April, 1904, there was cars ordered by letter.

Q. Was that system suspended then?

A. No sir, but the rules always was by letter or telephone.

42 Q. Letter or telephone?

A. Yes, but the reports to the best of my knowledge were always mailed in the afternoon on forms prescribed by the Railroad.

Q. Did those forms give you the privilege of ordering either by letter, telegram or telephone?

A. Yes sir, at that time.

Q. Did you begin ordering by letter at some time during the period of this action?

A. No sir, not by letter. On those forms, yes.

Q. On their form?

A. Yes sir.

Q. When did you start that?

A. That was always done during this action, except I think it was in December, 1906, I commenced keeping an office record of it, a water copy. Prior to that I kept no record.

Q. But previously you had ordered on their requisition blanks?

A. Yes sir, but I think it was either December or January, December 1906 and January 1907, is when I started to keep a water copy of my requisitions sent to the Railroad.

Q. How many cars was it your practice to order?

A. Invariably ordered the full rating of the mine.

Q. What was the effect of the irregularity of the car supply upon the cost of producing coal?

A. It increased the cost of production considerably.

Q. How do you account for that?

A. Because you couldn't get the output. Of course, your fixed charges were the same.

Q. What do you mean by fixed charges?

A. The fixed charges around the mine which went on whether there was any work or not.

43 Q. Do you mean there were certain items had to be paid for day by day whether the mine worked or didn't work?

A. Yes sir.

Q. What were they?

A. There was the engineer, the mine boss, the superintendent and office expenses, and we always kept one roadman on and in fact take all the Company men you had to give them a certain amount of work in order to keep the organization together whether there was work or no work.

Q. You had to keep up the mule feed?

A. Yes, that was fixed charges where we had mule haulage, the mule feed.

Q. And general expenses?

A. Yes sir.

Q. Was there any way that you could do otherwise than keep these up?

A. No sir, there was not.

Q. What effect did the idle days and the poor work have upon your ability to get men at the mines and keep your force together?

A. I couldn't keep no men. The men wouldn't stay, they would always go where there was work. You may get a man started to work for you two or three days and lay idle a few days and he says I cant stand this and he goes where there was work.

Q. Did that happen at your mines?

A. Frequently.

Q. Where did they go?

A. Invariably went to Berwind-White mines.

Q. Which ones?

A. 7, 16 and 27, and some of them to 28 and 22.

Q. Most of them to 7, 16, and 27?

A. Yes sir.

Q. They were the nearest?

A. They were the nearest.

* * * * *

44 W. R. CAMERON called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?

A. Houtzdale.

Q. What is your occupation?

A. Superintendent of Berwind-White Coal Mining Company.

Q. How long have you held that position?

A. About eight years and a half.

Q. Over what mines do you have supervision?

A. All over all the Clearfield district.

Q. Were you in charge as Superintendent of Eurekas 7, 16, 22, 27 and 28 in 1905, 1906 and 1907?

A. Yes sir.

Q. What was the approximate rating per day of Eureka 7 at that time?

A. About 400 tons.

Q. Where is that situated with reference to Falcon No. 2?

A. Falcon No. 2 is at Smoke Run, isn't it?

Q. Yes?

A. About 2 miles I suppose across the hill or two miles and a half.

Q. What was the rating of No. 27?

A. About 250 tons.

45 Q. 250 tons a day?

A. Yes sir.

Q. The rating of No. 16?

A. Well I think that was about the same. I hain't sure about that.

Q. The rating of No. 22?

A. I am not sure about that.

Q. You don't remember that?

A. No.

Q. The rating of No. 28

A. About 1000 tons.

Q. Is that the shaft?

A. Yes sir.

Q. Where?

A. We call it Ginter. This side of Bulah or Ramey.

Q. Did the mines produce up to their rating?

A. Pretty nearly so.

Q. Were they able to produce up to their rating?

A. I think so, that is when we could get men to produce the coal.

Q. When you could get men to work?

A. Yes sir.

Q. Did your Company have any connection with Standard No. 7 mine?

A. Bought the coal.

Q. You bought the coal?

A. Yes sir.

Q. Did you own the mine?

A. No sir.

Q. Did you own the lease?

A. No sir.

Q. How was that operated?

A. It was operated by Mr. Lew Beyer of Smoke Run.

Q. L. W. Beyer?

A. Yes sir.

46 Q. Who furnished the cars for that operation?

A. We did.

Q. Did it work pretty steadily?

A. Yes sir.

Q. What cars did you put in there?

A. Berwind-White cars, individual cars.

Q. And were those cars loaded for you by Mr. Beyer at a fixed price per ton?

A. Yes, maybe one or two cars, but generally all the cars placed there.

Q. Speak a little louder.

A. He may have loaded a few Pennsylvania, but generally black ball cars or individual cars.

Q. 250 tons per diem you say was approximately your rating at No. 27. How many cars is that a day?

A. It takes 10 25 ton cars, we rated them that way.

Q. Do you know as a matter of fact that beginning the latter part of 1905 the Railroad Company started to rate cars at 35 net tons per car?

A. Yes, I heard of it.

Q. Then your rating thereafter was less than 10 cars a day. about how many cars a day did you load there?

A. I couldn't tell without looking it up.

Q. Did you work pretty well?

A. Pretty fair, yes.

Q. Worked pretty steadily, did you?

A. Yes sir. When we had orders we worked.

Q. Did you work pretty steadily at No. 7?

A. Yes sir, steadier at No. 7 than 27.

Q. Even steadier than 27?

A. Yes sir.

Q. State whether or not it is a fact that in a general way from October, 1905, to May, 1907, your mines worked with reasonable regularity and steadiness?

A. Well they did. During the summer months of course when we didn't have orders they didn't. I couldn't tell you just exactly.

47 Q. They did during the summer months?

A. No, they did not when we didn't have orders.

Q. And in the winter when you had orders they worked pretty steadily, did they?

A. Yes sir.

Q. Can you give the approximate rating of No. 22?

A. Well I judge about 200 tons.

* * * * *

48 E. B. CHASE, called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. You are with the Berwind-White Coal Mining Company?

A. Yes sir.

Q. In what office?

A. Philadelphia office.

Q. What is your duty?

A. General manager of sales and shipping.

Q. Do you have charge of the books and records showing the

shipments of coal from Eureka mines in the Clearfield district, in the period from October, 1905, to May 1907?

A. Yes sir.

Q. Have you made a summary or table setting forth the number of cars mined and shipped from these respective operations, during the period mentioned?

A. I have.

Q. Do you have it with you?

A. Yes sir.

Q. Will you kindly refer to it. In October, 1905, how many cars were shipped from Eureka 7?

49 A. I would like to state that for the 3 months of 1905

I did not have in my possession the actual numbers of the cars that were shipped during that period, the records having been destroyed. The cars that I show on the statement that you have are based on tons divided by 25, as we figure a unit of a car.

Q. Have you compared that with any other data in possession of any of your forces to see whether approximately it tallies?

A. Well I compared coming up on the train with our Mr. Cameron with his total number of cars received during this time, just simply to see if we agreed as to the number of cars on this approximate analysis and the actual cars which he had, which he shipped.

Q. Did it correspond pretty closely?

A. Well during this entire period there was a slight variation I suppose due to that calculation of estimating cars. His records show 19,851 cars, whereas the records that I show there are 19,724, a difference of 127 cars.

Q. That is accounted for by the fact you use tons and divide by 25 for part of the period?

A. Yes sir.

Q. Now in October, 1905, how many cars were shipped from Eureka No. 7?

A. We show 391 cars.

Q. How many from No. 16?

A. 152.

Q. From No. 22?

A. 157.

Q. From No. 27?

A. 200.

Q. From No. 28?

A. 900.

Q. I understand No. 28 was your large operation in that territory?

A. Yes sir.

50 Q. Makes a total for that month of how many?

A. 1800 cars total.

Q. Is that the grand total?

A. That is grand total, from which should be deducted Pennsylvania Railroad supply coal.

Q. I mean does the 1800 include the supply coal cars?

A. Yes sir.

Q. It covers everything shipped out of these mines during that particular month?

A. Yes sir.

Q. For the mines, give the gross shipments for November, 1905?

A. No. 7, 415; No. 16, 146; No. 22, 113; No. 27, 287; No. 28, 898. Total 1859, from which 209 cars were shipped to the Railroad Company.

Q. Give a similar statement for December, 1905?

A. December, 1905. Eureka No. 7, 425; No. 16, 166; No. 22, 96; No. 27, 288; No. 28, 905. Total 1880, from which 207 should be deducted for supply coal.

Q. In January, 1906, how many cars were shipped from these respective mines?

A. From Eureka No. 7, I haven't that calculated in total or total for each mine. I will have to carry that out and it will take me a moment, if you wish me to.

Q. I wish you would. Take your time and do that throughout the period?

A. You want me to call off the total number of cars or the class of cars of each kind that were loaded?

Q. Total number from each mine?

A. January, 1906, Eureka No. 7, 301; Eureka No. 16, 148; No. 22, 78; No. 27, 271; No. 28, 750.

Q. February, 1906?

A. February, 1906, Eureka No. 7, 269; No. 16, 128; No. 22, 90; No. 27, 277; No. 28, 744.

Q. March?

51 A. Eureka No. 7, 331; No. 16, 147; No. 22, 94; No. 27, 332; No. 28, 850.

Q. Turn to August, 1906, please?

A. August, 1906, Eureka No. 7, 185; No. 16, 39; No. 22, 83; No. 27, 97; No. 28, 348.

Q. Was that the first month after the general strike in this region?

A. Well we were doing work during the other periods.

Q. Do you recall whether August was the first month subsequent to the general strike?

A. From other mines I understand it was. From our mines we were working.

Q. September, 1906?

A. September, 1906, Eureka No. 7, 165; No. 16, 41; No. 22, 66; No. 27, 122; No. 28, 511.

Q. October, 1906?

A. Eureka No. 7, 255; No. 16, 79; No. 22, 87; No. 27, 149; No. 28, 595.

Q. November, 1906?

A. Eureka No. 7, 328; No. 16, 83; No. 22, 79; No. 27, 199; No. 28, 695.

Q. December, 1906?

A. Eureka No. 7, 233; No. 16, 73; No. 22, 70; No. 27, 153; No. 28, 657.

Q. January, 1907?

A. January, 1907, Eureka No. 7, 260; No. 16, 56; No. 22, 56; No. 27, 112; No. 28, 572.

Q. February, 1907?

A. Eureka No. 7, 173; No. 16, 76; No. 22, 61; No. 27, 91; No. 28, 355.

Q. March?

A. Eureka No. 7, 311; No. 16, 98; No. 22, 66; No. 27, 181; No. 28, 581.

Q. April?

A. April, Eureka No. 7, 259; No. 16, 94; No. 22, 63; No. 27, 173; No. 28, 667.

Q. In these statements that you have given, Mr. Chase, 52 have you counted each car as one, for instance where a steel car?

A. With the exception of the first three months, where I averaged them 25 tons to the car as a car regardless of size.

Q. Regardless of whether they were steel or not?

A. Yes sir.

Q. Are you aware of the fact early in this period the Railroad Company counted a steel car two cars?

A. Yes sir.

Q. And at a period subsequent it was counted a car and a half?

A. 35 tons.

Q. Get your table and state how many of these cars in October were steel cars; October, 1905?

A. Pennsylvania or the Berwinds?

Q. All of them?

A. In October, 1906, we received 91 Pennsylvania Railroad steel cars and 89 Pennsylvania Railroad wood cars. We received 6 Berwind-White steel cars and 1168 individual wood cars.

Q. November?

A. November, we received 64 Pennsylvania Railroad steel cars and 108 Pennsylvania Railroad wood cars. 25 Berwind-White steel cars and 1195 individual wood cars.

Q. December?

A. December 63 Pennsylvania steel cars, 141 Pennsylvania wood cars, 17 Berwind-White steel cars and 1176 Berwind-White individual cars, wood cars.

Q. Make the same subdivision now for each month of the period?

A. January, 1906, we received 148 Pennsylvania Railroad steel cars, 171 Pennsylvania wood cars. We received 24 Berwind-White steel cars and 1205 Berwind-White wood cars. February, 1906, 69

53 Pennsylvania steel cars, 148 Pennsylvania wood cars, 25 Berwind-White steel cars, 1266 Berwind-White wood cars.

March 50 Pennsylvania Railroad steel cars, 211 Pennsylvania wood cars, 25 Berwind-White steel cars, 1478 Berwind-White individual cars, wood cars.

Q. Never mind April, May, June and July, it is not involved in this case. August?

A. August, 28 Pennsylvania Railroad steel cars, 8 Pennsylvania Railroad wood cars, 118 Berwind-White steel cars, 598 Berwind-

White wood cars. September, 16 Pennsylvania Railroad steel cars, 73 Pennsylvania wood cars, 25 Berwind-White steel cars, 791 Berwind-White wood cars. October, 20 Pennsylvania Railroad steel cars, 26 Pennsylvania wood cars, 3 Berwind-White steel cars, 1116 Berwind-White wood cars. November, 74 Pennsylvania Railroad steel cars, 42 Pennsylvania wood cars, 3 Berwind-White steel cars, 1265 Berwind-White wood cars. December, 1906, 133 Pennsylvania steel cars, 122 Pennsylvania wood cars, 1 Berwind-White steel car, 930 Berwind-White wood cars. January, 283 Pennsylvania steel cars, 156 Pennsylvania wood cars, 1 Berwind-White steel car, 601 Berwind-White wood cars. February 1907, 248 Pennsylvania steel cars, 128 wood cars, 1 Berwind-White steel car, 379 Berwind-White wood cars. March, 194 Pennsylvania Railroad steel cars, 124 wood cars, 919 Berwind-White wood cars. April, 184 Pennsylvania Railroad steel cars, 120 Pennsylvania wood cars, 952 Berwind-White wood cars.

By Mr. BIKLE:

Q. Mr. Chase, there in January aren't the individual cars 606?

A. 601.

Q. 696 isn't it?

A. 606.

54 By Mr. LIVERIGHT:

Q. During this period did you furnish cars for Standard No. 7 mine?

A. Yes sir.

Q. Do you have a summary made of the cars that you put in there?

A. Yes sir.

Q. Where does that appear on the table, what page?

A. It is on the bottom of each of the others.

Q. Do you have the total summarized?

A. For October, November and December, 1905, I have the totals there on page 3.

Q. How many were there?

A. October, 1905, 89. November 90. December 62.

Q. What kind of cars were they?

A. Presumably they are individual cars. I haven't that so marked. I can't tell at this time.

Q. Did your Company have control of any others?

A. Any other cars than our own, no sir.

Q. Then it would follow they were your own cars, wouldn't it?

A. Yes sir.

Q. How many did you furnish Standard No. 7 month by month thereafter?

A. January, 1906, 36.

Q. 10 of them were P. R. R. wood cars, weren't they?

A. Yes sir. I don't know why those got in there or how it happened. I see several places one or two cars are placed.

Q. February, 1906?

A. 29 cars.

55 By Mr. GOWEN:

Q. If they show Berwind-White, you had better state them?

A. In January, 1906, it shows 10 Pennsylvania wood cars and 26 Berwind-White wood cars. February one Pennsylvania wood, 28 Berwind-White wood. March, one Pennsylvania wood and 43 Berwind-White wood.

By Mr. LIVERIGHT:

Q. August?

A. August, 1906, 13 Berwind-White wood. September, 4 Pennsylvania wood and 32 Berwind-White wood. October, 76 Berwind-White wood. November, 82 Berwind-White wood. December, 64 Berwind-White wood. January, 1907, 2 Pennsylvania and 64 Berwind-White wood. February, 3 Pennsylvania steels, 8 Pennsylvania woods and 36 Berwind-White wood. March, 25 Berwind-White wood. April, one Pennsylvania wood and 9 Berwind-White wood.

Q. These data and others to which you have testified were prepared for you in under your supervision at your office in Philadelphia?

A. They were.

Q. Are they all contained in the table from which you have been testifying; all of which you have testified to here are contained in these tables I hold in my hand?

A. Yes sir.

(Marked Plaintiff's Exhibit No. 29.)

Q. This series of compilations marked Plaintiff's Exhibit No. 29 is the one from which you have gotten the figures from which you have just testified?

A. Yes sir.

Q. I observe herein a large number of cars with the initials above the column B. G. What are they?

A. They were individual cars.

Q. What does the B. G. stand for?

56 A. Stood for Bells Gap, the time of the old Bells Gap Railroad.

Q. The cars that came from the Bells Gap Railroad to the possession of the Berwind-White Coal Company?

A. If I remember right, the Berwind-White built them but ran them on the Bells Gap road.

Q. They are all wooden cars?

A. Yes sir.

Q. How was your coal trade during the summer of 1906 in this region, Mr. Cameron said something about not having orders during the summer months?

A. That is the usual condition in the coal trade during the summer months of idleness. If I remember correctly, during the summer of 1906 there was a strike.

Q. After the strike I mean?

A. As I remember, the trade at that time it was not particularly

active, as is always the case in summer months. In the fall it was quite active.

Q. What I am trying to get at, your business was affected similarly to the business of other operators in that respect?

A. Yes sir.

Q. State whether that in a measure accounts for the falling off in the car supply at that time?

A. Well I think perhaps our business differs somewhat in that respect, that whereas a number of the other shippers are rather dependent upon a poor car supply for good business, ours is rather more regular. In other words, if there are cars to go around at all times I think lots of them would not have as much business in the fall and winter, not having the regular orders. We are compelled to go in the market each fall and winter and buy by reason of the activity of the trade and difficulties due to movement of transportation, which is always in the winter months.

57 Q. Did the Berwind-White Company have any motive power of its own for the movement of these cars?

A. No sir.

Q. Whose motive power operated the cars from the mines to destination or from the distribution yards to the mines?

A. So far as I know the Pennsylvania Railroad.

Q. Did that apply as well to your private cars as to their system cars?

A. Yes sir.

Q. And were they all moved over the tracks of the Pennsylvania Railroad Company from the mines to points of delivery?

A. Not necessarily to points of delivery; to junction points perhaps.

Q. To junction points?

A. Yes sir.

Q. You had no independent motive power or trackage?

A. No sir.

Cross-examination.

By Mr. GOWEN:

Q. In your testimony you have referred to the Berwind-White cars put in your mines, designated either as Berwind-White or individual cars, and also to Bells Gap cars. Were all those cars owned by the Berwind-White Company?

A. Yes sir.

Q. And were operated over the lines of the Pennsylvania Railroad as the private or individual cars of that Company?

A. Yes sir.

Q. Have you in that statement the total number of Pennsylvania cars that were received at your mines during the period?

58 A. Yes sir.

Q. That you were testifying to?

A. What did you say?

Q. During the period you have been testifying to?

A. Yes sir.

Q. In giving those figures you will have to do a little more calculation and take out those four months. I suppose you have those in?

A. During those summer months?

Q. You can tell what they were, just those four months?

A. I have made a deduction of those four months.

Q. Now taking the balance of the months included in the period of the action, how many Pennsylvania Railroad cars were delivered to all the mines in the aggregate of the Berwind Coal Mining Company?

A. 2797.

Q. 2797?

A. Yes sir.

Q. How many of those were delivered for shipments of the Berwind-White Coal Mining Company?

A. 1131. The balance of them were fuel coal placed for fuel orders by the Pennsylvania Railroad.

Q. To be loaded with fuel coal?

A. Only.

Q. Which you were delivering under their orders?

A. Yes, we had no control of those cars whatever.

Q. Now do the figures which you have given include the Beyers mine?

A. No sir.

Q. How many Pennsylvania Railroad cars were delivered to that in the same period?

A. January 1st, 1906 to May 1st, 1907 there were 3 Pennsylvania Railroad steel cars and 25 wood.

Q. That is from January 1st?

A. January 1st, 1906 to May 1st, 1907.

59 Q. And the preceding period, two and one-half months preceding, have you got those figures?

A. October, 1905, there were 89. These were all individual cars.

Q. I am speaking of Pennsylvania cars?

A. No sir, no Pennsylvania cars delivered to Standard during that time.

Q. In the months preceding January, 1906, no Pennsylvania Railroad cars were delivered to the Beyers mine?

A. Only individual cars.

Q. And in the period following January 1st, 1906, there were how many Pennsylvania Railroad cars delivered to Beyers mine?

A. 3 Pennsylvania Railroad steel and 25 wood cars.

Q. They were all delivered, I take it, for commercial shipments of the Berwind-White Company?

A. I don't recall now how they got in there. There were very often occasions when a train in making its delivery of cars would get to a certain point and have cars over they might run into any mine. I don't recall at this time why they run into Standard mine. I don't remember any orders. We never gave any orders for Pennsylvania Railroad cars into the Standard mine.

By Mr. LIVERIGHT:

Q. Of the 1131 Pennsylvania cars supplied to the Berwinds for commercial shipments, how many were steel?

A. There was 717.

Q. And of those 717 how many were supplied the last three months of 1905?

A. Of 1905?

Q. The last three months?

A. 91 in October. 64 in November and 63 in December.

60 J. A. JARDENE called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

* * * * *

Q. State whether or not this period of action, October 1905 to May 1907 constituted a normal time in the coal business?

A. Yes, it was a normal time.

* * * * *

61 A. C. BOWSER called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?

A. Smoke Run.

Q. What is your business?

A. Mine foreman.

Q. Were you ever in the employ of Clark Brothers & Jacoby?

A. Yes sir.

Q. Where?

A. At Falcon No. 2.

Q. When?

A. I think I started there the 11th of July, 1904, and I was with them until April, 1909.

Q. As foreman?

A. Yes sir.

Q. What was the capacity of the No. 2 mine from 1905 to 1907 to produce bituminous coal?

A. About 600 tons.

Q. How many working places were there?

A. Well there was from 100 to 118.

Q. That is varying at different times within that period?

A. Yes, not any less than 100.

Q. How many tons per day could the average mine dig there?

A. Well we always figured on 3 tons conservatively.

Q. How do you derive your 600 tons?

A. Two men in a place.

Q. Was the outside equipment of the mine adequate to load that much coal?

62 A. Yes, I think so.

Q. What was the height of the coal?

A. It ran from about 2 feet 6 to 2 feet 10. Some odd places were 3 feet, not very many.

Q. Did you have sufficient bank wagons and haulage facilities to load and take out that much coal?

A. Yes sir.

Q. Did you at any time get that much coal out?

A. No sir.

Q. Why not?

A. We never had cars enough.

Q. What kind of cars?

A. Railroad cars.

Q. Do you know anything about the car supply to your neighbors up there?

A. Well the Berwind-White or the Eureka mines right close around they seemed to get a supply when we didn't.

Q. Were there some days on which No. 2 got no cars?

A. Yes sir.

Q. Was that rare or otherwise?

A. I think in 1905 we had probably enough cars to run from 2 to 3 days a week, some where along there.

Q. 1906 how was it?

A. About the same.

Q. And in the first four months of 1907?

A. Well very little difference.

Q. On days that you had no cars sufficient to run did the Berwind mines in the vicinity have any cars?

A. Yes sir.

Q. Were there cars moving along the Moshannon Branch?

A. Yes sir.

Q. On the same days?

A. Same days.

63 Q. What was the highest number of men you had employed?

A. 110.

Q. From that how small did the force become?

A. At one time we run down to 17 men.

Q. What was the reason of this fluctuation in the force?

A. The chief cause was the car supply. We couldn't get car supply so that we could hold our men.

Q. What effect did that have on keeping your men together?

A. When we would be idle two or three days the men working there would go somewhere else to find work.

Q. Do you know where they went?

A. Mostly they went across the hill, just a little piece across to Eureka 27. They went across there because they were working.

Q. The Berwind mines?

A. Yes sir.

Q. When you would get any cars after a period of idleness what shape would you then be in to load them?

A. Not very good shape. Mostly the men would be gone.

Q. Would you make any efforts to gather a new force together?

A. Yes sir, if we would get cars probably two or three days along we would gather up a few, but if we didn't get any cars again they would go again.

Q. Can you with any degree of economy operate a mine where the car supply is irregular, spasmodic and cars come in in sufficient quantity only to run a few hours of a day?

A. No, you can't.

Q. Why not?

A. You can't keep your force together and it costs more to produce coal because you have got a certain number of men employed to run the mine, and if you have plenty of cars so you can produce more coal you can produce it at a less figure.

* * * * *

64 Q. Do you recall whether or not these periods in which you received no cars extended over more than one or two days at a time?

A. I think there is one instance I remember is 6 days one time we had no cars, and then I believe we got a car or two and only worked part of a day, and then we were idle two days again.

Q. Those six days consecutively you got no cars, then you got a couple of cars and were working part of a day?

A. I don't know whether it was part of a day or a whole day, but at any rate I remember we were idle again 2 or 3 days again after that.

Q. That is to say, in a period of 10 days there was part of one day you were able to work?

A. Yes sir.

Q. Was that due to any other cause than the car supply?

A. I think that was due to the car supply as near as I can recall.

Q. When you would have a period of idleness extending pretty nearly for 10 days that way and unexpectedly or suddenly a fairly large supply of cars would come in on a particular day, would you be prepared to load them?

A. No. Then I understood when we didn't load them why they charged them up to us on our next day's rating.

Q. That is to say, if you got in 10 cars after being idle for a week, you wouldn't have men or force there sufficient to load them?

A. No.

Q. Then if you would load 2 cars that day and have 8 standing over you would be charged for the 10 the first day and then for the remaining 8 the second day?

A. That is what I understood, yes sir.

65 Q. And if there were 5 of them or 3 of them standing over the third day, you would be again charged with these same 3 or 5?

A. Yes sir.

Q. State whether or not if you had been furnished cars with some

degree of regularity, you would have been able to load 10 or 12 cars a day so as to avoid this double or triple charge of the same car?

A. Yes sir, we would have been able to load them. I think we did load them. I think we loaded 360 ton there, that is, with the inadequate supply we did have at one time in one day.

* * * * *

66 JOSEPH H. DORN called on part of Plaintiff, being duly sworn and examined, testified as follows:

* * * * *

By Mr. COLE:

Q. The Counsel, on cross-examination, has attempted to show by your testimony that the reason you couldn't make these sales was because they didn't have private cars. What difference did private cars make?

A. Well the large consumers of coal to a large degree felt that the conditions of the coal trade were such that the independent shippers whom the talk in the trade was didn't get any railroad favors in the way of shipments, if they didn't have private cars they were not in position to say what they could do or could not do and they felt that the man that had private cars could practically guarantee shipments of his own cars.

Q. Didn't the whole thing depend on delivery, the question of delivery, didn't make any question whose cars they came in, if they could deliver it?

A. That was absolute.

Q. Didn't that absolutely follow in this testimony on the very page the learned gentleman quit reading, and didn't you make that explanation?

A. Yes sir.

Mr. GOWEN: Will you read that?

Mr. COLE: Judge KREBS: I want these outside the State of Pennsylvania particularly, will you refer to your memorandum? Mr.

DORN: Yes, if I have permission to do that. I believe you have some statements there that I have not. Judge KREBS: The Cumberland Glass Company, what was your relation to them and what occurred there as to the amount of tonnage? Mr. DORN: I

67 had the opportunity of bidding on the business and had shipped them some sample cars, but when it came down to talk and closing the final contracts they told me they were afraid to take the chances of the shipper not having their own cars on account of deliveries. That is all.

By Mr. GOWEN:

Q. Mr. Cole has just read an abstract from your testimony before the Interstate Commerce Commission relative to your negotiation with the Cumberland Glass Company?

A. Cumberland Glass Company.

Q. That is the concern is it not which you had referred to as requiring 100,000 tons. The first one I think you referred to?

A. Yes sir, that is right.

Q. Now in your testimony before the Commission the proceeding before the Commission is this: I had the opportunity of bidding on the business and had shipped them some sample cars, but when it came down to talk and closing the final contracts they told me they were afraid to take the chances with the shipper not having their own cars on account of deliveries. Then he asked you, all that happened was that you had shipped sample cars and that you were given the opportunity to bid for the business. That is what you say here?

A. You are reading from the record. I don't remember exactly what I said.

Q. Suppose you just read just that part that Mr. Cole read to you?

A. Yes, that is correct.

Q. Now is what you have said there as to the Cumberland Glass Company business true as to all these other contracts; was it that you had simply progressed to the point you were told they would be glad to receive bids from you?

68 A. No, it had gotten into more definite shape than that.

Q. Tell us what concerns you had got beyond that point?

A. Beyond that point? Well the Maryland Coal & Coke Co. we had absolutely arrived at the price and the tonnage of 100,000 per year. That business was for tide water shipments, and in the nature of a tide water business you have got to be absolutely certain of having your cars there when your vessels arrive or else you have got a very heavy per diem charge for demurrage on the vessels, and after talking that over with Mr. Clark and spending some time on it we declined to accept the contract. We could have had that. And the W. A. Clark Coal Company at Northampton, Massachusetts, my recollection is that the price was established and the coal was satisfactory and it was a matter of closing the contract. We withdrew from that. And with the Cumberland Glass Company I think we shipped several samples there at several times. They made quite some tests on it and it was found satisfactory, and I had made a tentative price to them which was satisfactory, and after that was established then the question was brought to a focus as to whether we could reasonably guarantee regular shipments and we couldn't do it, so we withdrew. And Worth Brothers, at Coatesville, we had sold them sample cars and as I remember 5 and 10 car lots several times. I think they made some extended tests on that and that coal was satisfactory for their rolling mill work and then I think they made us a proposition of taking 100,000 tons. They used considerably more than that and was going to give us part of it.

Q. You say you think they made the proposition. Do you know?

A. Well they did make a proposition, that is, they asked us whether we would make a contract at that price for about 100,000 tons and we refused to do that.

69 Q. What was the price they offered to pay?

A. I don't remember that price, Mr. Gowen. Now the N. Z. Graves contract, I don't just recall what the exact status of those negotiations were. I know the question hinged on that regular number of cars on every other day and when that thing had to be

decided why we simply withdrew. I think that is as far as I could go on the rest of them. The other cases the cars had been shipped and the samples were satisfactory and the price was approximately satisfactory, and that if the price hadn't been satisfactory we could probably have reduced it a little bit to get the business. So we were practically assured of getting what we wanted on those contracts.

Q. Are you able to state just what the total of this business was you had an opportunity to secure?

A. I did state I think it was something over 600,000 tons. I can add those up. I make that 535,000 tons.

70 C. W. PROCTOR called on part of plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

Q. Where do you live?

A. New York City.

Q. What is your business?

A. The purchase and sale in connection with the Steele Coal Company of anthracite and bituminous coal.

Q. Did you have any business with Clark Brothers Coal Mining Company from 1905 to 1907?

A. During most all of that period, the latter part of 1905 and all of 1906 and 1907.

Q. What connection did you have with them, what was the nature of the business?

A. We bought from them. It was our idea in the early part of our dealings with them that we might possibly become agents in New York and New England for them.

Q. What experience did you have with getting deliveries of coal from them?

A. Except during the summer months we couldn't get any continued deliveries with them, especially during the winter of 1906.

Q. What efforts did you make, if any, to do so?

A. To get the deliveries?

Q. Yes?

A. Why the usual efforts. We telephoned and telegraphed and wrote demanding our coal.

Q. Why couldn't you get the deliveries, what excuse was made to you?

A. Always that there weren't cars.

Q. What effect does that have on a coal producer's business, if he can't make deliveries any better than they made them to you?

71 A. It is practically ruinous to their business. Certainly the sale of coal depends on the delivery of it. If you sell coal and don't deliver it, you haven't made a business.

Q. What effect did it have on your connection with them?

A. It had the effect that we came to a point where we decided that the only way we could do business with them was simply on spot coal, that is by the day. When they had coal we bought it and

sold it if we could make a profit. We declined during that period to enter into anything that might cover a period of time.

Q. What character of coal did they handle?

A. The Moshannon coal we regarded for people who want coal of that character, it is a coal of a distinct character, we regarded Falcon No. 2 as the best coal of that character in the ground.

Q. Has it a market?

A. It has a ready market at any time of the year.

* * * * *

72 P. E. WOMELSDORF recalled on part of plaintiff.

By Mr. LIVERIGHT:

Q. When you retired from the stand last night you were in the midst of explaining this map of yours of the Cush Creek region. Will you continue that explanation?

A. I explained that this map represented the land, with their owners, etc. in the Cush Creek region, and the branch of the Pennsylvania Railroad which reaches this Cush Creek region known as the Cush Creek Branch runs along on the eastern part of this map, so far east that it can't be put on. The Horton Run Branch, which came from the Cush Creek Branch, turns off and runs to the north-west and runs to a point here. On this Horton Run Branch is this Falcon No. 5 and 6 mines, opened at this point on the J. O. Clark tract. Last night I inadvertently put it on this. I couldn't see very well.

Q. What coal is there on that tract?

A. The coal on that tract? You want the seams of coal?

Q. Yes?

73 A. The "B" seam of coal underlies that particular property and also the "C" Prime seam of coal and the "D" seam of coal.

Q. On what vein is No. 5?

A. No. 5, the seam of coal is opened on the "C" Prime coal.

Q. No. 6?

A. No. 6 is opened on the "D," overlying the "C" Prime.

Q. What acreage is there of each of these upper veins?

A. I couldn't testify as to the number of acres that are on those. The Falcon No. 6 seam of coal is practically a burden seam and hadn't been worked much prior to the opening of No. 6 and embraces a pretty fair area there, while No. 5 was opened on the back end of an old mine that was in existence some years ago. There is some considerable area left in there, although I can't tell you how much.

Q. Do you know of any drill holes being put down on this property?

A. I only know by hearsay. I don't know anything about those drill holes.

Q. Do you know anything about the plant at No. 5 and 6 operations in 1905, '6 and '7?

A. Well they put up a plant there for the purpose of loading

that coal, a plane and tipple for loading this coal from this operation.

Q. Was there a long tramroad to No. 5 drift?

A. Well my recollection on that is vague. It is some years since I was there. I remember it laid pretty well up on the hill above the railroad and required some engineering to get it down.

Q. Do you recall whether both 5 and 6 loaded coal on the same tipple?

74 A. I believe they did, yes sir, load coal on the same tipple.

Q. Do you know anything about the capacity of these mines in the period of the action?

A. I can't testify as to that, no sir.

Q. Are you more familiar with the mines on the Moshannon Branch than you are with these two, with the Falcon 2, 3 and 4?

A. Yes, Falcon 2 3 and 4 I made a very careful examination at that time in order to determine their output.

Q. What was the productive capacity of Falcon 3 mine from October, 1905, to May, 1907?

A. Do you mean the productive capacity as determined by me in my examination?

Q. Yes?

A. I should be glad to have the record of that, because it is some years ago.

By the COURT:

Q. Didn't you give this?

A. I think I testified to that yesterday, some 600 tons.

By Mr. LIVERIGHT:

Q. That was No. 2?

A. Yes, No. 2 was some 600 tons. The report of October 25th, about, 1906.

By the COURT:

Q. 120 for No. 3 and 275 for No. 4 is what you testified to?

A. And I think 600 for No. 2.

Mr. GOWEN: No cross-examination.

75 E. C. HOWE called on part of plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

* * * * *

Q. Up to that time what had been your own estimate of the output capacity of No. 5?

A. Well I would suppose about that.

Q. Was it gradually developed from January to July?

A. Very gradually, yes sir, very gradually.

Q. What caused it to come so slowly?

A. Well there was no way to develop the mine any faster than

we did, unless we hauled the coal out again and piled it outside, which at least would have added 20 or 25 cents a ton to the cost of it for unloading and shovelling and loading again.

Q. Didn't you get a good railroad car supply?

A. No.

Q. How did the car supply run?

76 A. About one third of the time according to the reports, we didn't have anything at all.

Q. How about the other two-thirds?

A. Well in looking over my reports I see we took 35 days in August and September and we worked 110 hours.

Q. 35 days?

A. In 35 days. 15 of them days we didn't get anything and about an average of 3 hours a day. That was up to the time I left there in August or September.

Q. When did you say you left?

A. About the middle of September.

Q. What kind of coal was this to work?

A. Fine coal. Good big coal.

Q. High coal?

A. Yes, I could walk in it very well.

Q. How much of it was there in the hill?

A. I couldn't give an estimate of that. I never was over the territory.

Q. Can you give an approximate estimate of it?

A. No sir, I wouldn't like to do that.

Q. Did you have anything to do with No. 6 mine?

A. To a certain degree I had, yes. When I went there they were opening it. There was a man had it by contract and Mr. Clark asked me to go up occasionally and see how he was getting along. The coal after it started to come down I think for a while it was classed in with No. 5 coal although I think it was kept separate on the sheet down in the scale house, but after the strike was over Mr. Clark put a man there.

Q. As foreman?

A. Yes sir.

Q. Then did you have a foreman at No. 5 and No. 6; that is two altogether?

A. Yes sir, part of the time.

Q. What sized mine was No. 6?

A. That is opened up territory?

77 Q. Yes?

A. It was pretty well opened up. I suppose there would be room in there for, let me see I have it here. There was 11 rooms turned in it July 9th.

Q. From that time on did the capacity of it gradually increase?

A. Well they kept working driving headings up and kept making more room.

Q. Do you know anything about the car supply there?

A. Well the car supply there was just the same as it was at No. 5. The coal all went over the same tipple.

Q. There was only one car supply to talk about then?

A. Yes, there were two planes there. The "C" Prime coal was planed down about 450 feet down a plane that had about 25 per cent grade on it. Then above that we had 1200 feet of a tramroad took us up to the "C" prime coal. Then there was about 600 feet of another plane from that up to the "D" coal, the Moshannon. But down at this junction at the foot of this No. 6 plane the roads came together and virtually one road went to the tippie and one side track for the two mines.

Q. Was there any reason that you know of why more coal was not produced at 5 and 6 while you were there, except the car supply?

A. That is all.

* * * * *

78 JOHN B. SALSGIVER called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Were you foreman at the Falcon 5 and 6 mines in 1906?

A. I was, yes sir, in the fall of 1906 at No. 5.

Q. How long were you employed there?

A. About 3 month- I think, as near as I can recollect. Near about 3 month-.

Q. How was the car supply then?

A. It was very poor.

Q. About how did it run?

A. Well I could hardly tell till I would look at those daily reports.

Q. Did you make daily reports about it?

A. Well I made my cost sheet out you know and that gave the amount of hours worked. They will tell what flats we had, because when we only had one or two it didn't take long to load them.

Q. I hand you a bunch of sheets and ask you whether your name is thereto attached. You had better look through them carefully?

A. Yes sir, that is my name. Those are mine.

Q. Those are the reports you made?

A. These are the daily reports.

Q. To whom did you make them?

A. To the Company. Sent them to the Company's office in the evening or sometimes during the day.

Q. Will you go over them and state the time you worked during the period that you were in the employ of the Company?

A. September 18th seems to be my first one, the mine was idle. The 19th mine idle. I made one out whether the mine was idle or not. The 20th mine idle. The 21st mine idle. The 22nd mine idle. The 24th the mine worked two hours.

By the COURT:

Q. What about the 22nd and 23rd?

A. I have got the 22nd. I did go over the 22nd. It was idle on the 22nd. The 23rd might have been Sunday. The 24th two

hours were worked. The 25th mine idle. The 26th mine worked 3 hours. The 27th two hours. The 28th mine idle. The 29th we worked 5 hours. We don't have the 30th here, it probably was Sunday. October 1st we worked 6 hours. October 2nd 8 hours. October 3rd 3 hours. October 4th 8 hours. The 5th we worked 5 hours. The 6th mine idle. The 7th I haven't got it here, 79 it probably was Sunday. October 8th mine idle. October 9th idle. I don't seem to have the 10th, unless it has got mixed among them here. October 11th mine idle. October 12th mine idle. The 13th mine idle. The 15th mine idle. The 16th worked 3 hours. The 17th mine idle. The 18th worked 5 hours. The 19th 3 hours. The 20th 6 hours. The 22nd 8 hours. The 23rd 8 hours. The 24th 8 hours. The 25th 5 hours. The 26th 2 hours. The 27th 3 hours. The 28th day probably was Sunday. The 29th mine idle. The 30th worked 7 hours. The 31st 8 hours. November 1st we worked 8 hours. The 2nd 8 hours. The 3rd 2 hours. November 5th mine idle. I guess I haven't got the 4th, it probably was Sunday. November 6th mine idle. November 7th 5 hours worked. The 8th 4 hours. The 9th 5 hours. The 10th 2 hours. The 12th the mine was idle. The 13th idle. The 14th worked 7 hours. The 15th 2 hours. The 16th the mine was idle. The 17th idle. The 18th, I haven't got it, it probably was Sunday, but on the 19th we worked 5 hours. On the 20th 4 hours. On the 21st 4 hours. The 22nd mine idle. The 23rd mine idle. The 24th worked 6 hours. Then I haven't got none here till the 27th we worked 5 hours, and on the 28th we worked 5 hours. That is the last I have got.

Q. What reason was there for these periods of idleness at the mine?

A. We didn't have any railroad cars to load coal in.

Q. Was there any other reason you know of?

A. No other reason I know of while I was there.

Q. Did you have men to load cars if they were put in?

A. Yes, we did.

* * * * *

80 E. B. KOOZER called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. What is your business?

A. My business now is woods superintendent.

Q. Were you in the employ of Clark Brothers & Jacoby?

A. Hillsdale Coal & Coke Company.

Q. In what capacity?

A. Superintendent.

Q. While you were engaged for them did you put in the plant at Falcon No. 5 for Clark Brothers & Jacoby?

A. I did.

Q. Do you know anything about the coal territory that is tributary to Falcon 5 and 6 mines?

A. At the present time?

- Q. No, at that time?
A. I would judge in the neighborhood of 40 or 45 acres of the "C."
Q. 40 or 45 acres of the "C"?
A. Yes sir.
Q. On that side. How much of the "D"?
A. 35 acres of the "D." That is according to the survey.
Q. How much of the "B" vein?
A. 312 of the "B."
Q. Do you know where the H. E. Clark property is?
A. Yes sir.
Q. Where does it lie with reference to the J. O. Clark?
A. Directly west.
Q. Adjoining it?
A. Yes sir.
Q. What unmined acreage of coal is there on it?
A. What seam?
81 Q. On the "B"?
A. 50 acres of the "B." The "B" crops out on it.
Q. How much of the "C" Prime?
A. Well now in my statement prior to this of the "C" Prime I included that.
Q. You did?
A. Yes sir, it was adjacent to this.
Q. Together how many acres were there of this vein "C" Prime?
A. I figured the time of the opening of 5 would be 40 to 45.
Q. How much is the total unmined acreage of the "D" vein in the J. O. Clark property?
A. 75 acres.
Q. How many tons would that run to the acre?
A. That would run 1000 tons to the foot. It would run 3000 tons to the acre.
Q. What is the thickness of the "C" Prime vein?
A. 5 feet.
Q. Would it run 1000 tons to the acre also?
A. Yes sir.
Q. Would all this coal run the same to the acre?
A. Yes sir. That is conservative, that statement. It would run more than that.
Q. When you say it would run 1000 tons to the acre do you mean that much could be mined or that much is contained in the property?
A. That much could be mined. That allows for loss in mining.

* * * * *

- 82 THOMAS BRYSON called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

- Q. Where do you live?
A. Glen Campbell.

Q. Have you ever done any work for the Clark interests in the way of counting cars?

A. I have.

Q. Where?

A. At Glen Campbell on the Pennsylvania Railroad of the Cush Creek Branch.

Q. At what operations?

A. All operations mining and loading coal on the Pennsylvania Railroad.

Q. On that particular branch?

A. Yes sir.

Q. What operations were they?

A. They were the Urey 3 and 5. Bellmore No. 6, which later changed to Urey No. 6. Urey No. 1. Glenwood No. 9. Glenwood No. 4. Indiana No. 4. Indiana No. 2. Indiana No. 3. Indiana No. 8. Falcon No. 5. Hillsdale Nos. 2 and 3.

Q. What was the routine you followed in getting these car memorandums?

A. Visited each and every one of those mines every morning personally.

Q. Did you examine the sidings?

A. I did.

Q. To see what cars were placed thereon?

A. I did.

Q. What note did you make of it?

A. I carried a memorandum book with me, which showed date, placing cars, all cars left over and from what date they were left over. Also stating the kind of cars and capacity.

83 Q. Did you make any duplications of these car receipts?

A. I did, I made out a report each and every day.

Q. I don't mean duplicate reports, but did you duplicate the cars in any way?

A. No sir, only in checking them back. Now if I would get cars today and they would still be on the siding tomorrow, I would mark the list of cars over on that date from today.

Q. Would you put the new cars received in a separate place?

A. Yes sir.

Q. In order to prevent the duplication of new cars received did you put down the numbers and initials of each car?

A. Each and every car I did.

Q. At each mine?

A. At each and every mine.

Q. When did you do this work?

A. I began March 1st, I believe, 1906, and continued until April 2nd. Of course the strike period came in there, and I then resumed that work I believe it was October 11th, of 1906, and continued up until the 15th of May, 1907.

Q. Worked at it continuously, did you?

A. Yes sir.

Q. What mines on that branch are commonly known as the Williams mines?

A. The Glenwood operations and the Urey Ridge.

Q. And Bellmore?

A. Bellmore, which was later changed to Urey No. 6.

Q. Have you made a summary for the period which you were engaged in this car counting, showing day by day the cars received respectively by Williams & Company and Clark Brothers Coal Mining Company?

A. I have.

84 Q. Beginning in March, 1906, state how many cars were received by the Williams interests for that month?

A. March, of 1906, 670½ cars.

By Mr. O'LAUGHLIN:

Q. Is a car a car or do you translate it?

A. A steel is 1½.

By Mr. LIVERIGHT:

Q. How many by the Clark Brothers interests?

A. 56½.

Q. Now were there days on which Clarks received no cars and the Williams interests received a number of cars, running throughout this period.

A. There were quite a number, yes.

Q. Take the month of March, how many days were there that Clarks got no cars at all?

A. There were six days.

Q. How many that Williams got none at all?

A. There were no days.

Q. That is they got cars every day?

A. Each and every day.

Q. Now on this 6 days on which Clarks got none, state how many the Williams interests received, giving the dates?

A. March 13th Williams interests 33 cars, Clark Brothers Coal Mining Company nothing.

March 16th Williams & Company 29 cars, Clark Brothers nothing.

The 21st Williams & Company 9½ cars, Clark Brothers nothing.

The 22nd Williams & Company 19 cars, Clark Brothers nothing.

The 23rd Williams & Company 9, Clark Brothers nothing.
85 The 26th Williams & Company 18½ cars, Clark Brothers nothing.

Q. Follow that through month by month, Mr. Bryson? I will ask you beginning with the next month of which you kept any track, to give the receipts day by day of these two respective operators. What was the first day in October that you counted?

A. October 11th, 1906, Williams & Company 4, Clark Brothers nothing.

The 12th Williams & Company 5, Clark Brothers nothing.

The 13th Williams & Company nothing, Clark Brothers nothing.

The 15th Williams & Company 6, Clark Brothers 1½.

- The 16th Williams $7\frac{1}{2}$, Clark Brothers nothing.
 The 17th Williams & Company $10\frac{1}{2}$, Clark Brothers $1\frac{1}{2}$.
 The 18th Williams & Company $10\frac{1}{2}$, Clark Brothers $1\frac{1}{2}$.
 The 19th Williams & Company 10, Clark Brothers 3.
 The 20th Williams & Company $15\frac{1}{2}$, Clark Brothers $4\frac{1}{2}$.
 The 21st Williams & Company $19\frac{1}{2}$, Clark Brothers 6.
 The 23rd Williams & Company 24, Clark Brothers $1\frac{1}{2}$.
 The 24th Williams & Company 9, Clark Brothers 1.
 The 25th Williams & Company $7\frac{1}{2}$, Clark Brothers $1\frac{1}{2}$.
 The 26th Williams & Company $34\frac{1}{2}$, Clark Brothers $1\frac{1}{2}$.
 The 27th Williams & Company 10, Clark Brothers nothing.
 The 29th Williams & Company 21, Clark Brothers 3.
 The 30th Williams & Company $22\frac{1}{2}$, Clark Brothers 6.
 The 31st Williams & Company 30, Clark Brothers 3.
- 86 Q. Total for the 17 days of the month?
- A. David E. Williams & Company 247 cars, Clark Brothers $35\frac{1}{2}$.

By Mr. BIKLE:

- Q. That is October, 1906?
 A. That is for October.

By Mr. LIVERIGHT:

- Q. Proceed with November?
 A. November 1st, 1906, Williams & Company $21\frac{1}{2}$, Clark Brothers $1\frac{1}{2}$.
 The 2nd Williams & Company 16, Clark Brothers 2.
 The 3rd Williams & Company $13\frac{1}{2}$, Clark Brothers nothing.
 The 5th Williams & Company $21\frac{1}{2}$, Clark Brothers nothing.
 The 6th Williams & Company 6, Clark Brothers 3.
 The 7th Williams & Company $12\frac{1}{2}$, Clark Brothers 2.
 The 8th Williams & Company $18\frac{1}{2}$, Clark Brothers 3.
 The 9th Williams & Company $4\frac{1}{2}$, Clark Brothers 1.
 The 10th Williams & Company, $3\frac{1}{2}$, Clark Brothers nothing.
 The 12th Williams & Company 3, Clark Brothers nothing.
 The 13th Williams & Company 16, Clark Brothers 3.
 The 14th Williams & Company 8, Clark Brothers 1.
 The 15th Williams & Company 3, Clark Brothers nothing.
 The 16th Williams & Company 2, Clark Brothers nothing.
 The 17th Williams & Company 3, Clark Brothers nothing.
 The 18th Williams & Company $7\frac{1}{2}$, Clark Brothers 3.
 The 19th Williams & Company $16\frac{1}{2}$, Clark Brothers 2.
 The 20th Williams & Company $17\frac{1}{2}$, Clark Brothers 3.
 The 21st Williams & Company $4\frac{1}{2}$, Clark Brothers nothing.
- 87 ing.
- The 22nd Williams & Company $7\frac{1}{2}$, Clark Brothers nothing.
 The 23rd Williams & Company 21, Clark Brothers $4\frac{1}{2}$.
 The 24th Williams & Company $7\frac{1}{2}$, Clark Brothers 3.
 The 25th Williams & Company $19\frac{1}{2}$, Clark Brothers 3.
 The 26th Williams & Company 24, Clark Brothers 6.
 The 27th Williams & Company 25, Clark Brothers 6.

The 27th Williams & Company 25, Clark Brothers 1.
 The 29th Williams & Company, $9\frac{1}{2}$, Clark Brothers nothing.
 The 28th Williams & Company $10\frac{1}{2}$, Clark Brothers nothing.
 The 30th Williams & Company $4\frac{1}{2}$, Clark Brothers nothing.

By Mr. O'LAUGHLIN:

Q. Tell me on the 29th what Clark Brothers was?

A. Clark Brothers nothing.

By Mr. LIVERIGHT:

Q. Total for the month?

A. David E. Williams & Company $327\frac{1}{2}$ cars, Clark Brothers 42.

Q. Was there a single day that month in which Williams missed getting cars?

A. No sir.

Q. How many days did Clark Brothers fail to get any?

A. 12 days.

Q. December?

A. December 1st, David E. Williams Company 11, Clark Brothers 1.

The 2nd David E. Williams & Company 13, Clark Brothers 2.

The 3rd David E. Williams & Company $16\frac{1}{2}$, Clark Brothers 1½.

The 4th David E. Williams & Company $18\frac{1}{2}$, Clark Brothers 2.

The 5th David E. Williams & Company 27, Clark Brothers 2.

The 6th David E. Williams & Company 21, Clark Brothers 2.

The 7th David E. Williams & Company 14, Clark Brothers nothing.

The 8th David E. Williams & Company $24\frac{1}{2}$, Clark Brothers 1½.

The 9th David E. Williams & Company $31\frac{1}{2}$, Clark Brothers 2.

The 10th David E. Williams & Company 41, Clark Brothers 6.

The 11th David E. Williams & Company $32\frac{1}{2}$, Clark Brothers 1.

The 12th David E. Williams & Company $31\frac{1}{2}$, Clark Brothers, 7.

The 13th David E. Williams & Company $7\frac{1}{2}$, Clark Brothers 7.

The 14th David E. Williams & Company $41\frac{1}{2}$, Clark Brothers $4\frac{1}{2}$.

The 16th David E. Williams & Company 29, Clark Brothers 3.

The 17th David E. Williams & Company 28, Clark Brothers 4.

The 18th David E. Williams & Company 17, Clark Brothers nothing.

The 19th David E. Williams & Company 8, Clark Brothers nothing.

The 20th David E. Williams & Company 3, Clark Brothers nothing.

The 21st David E. Williams & Company 14, Clark Brothers nothing.

89 The 22nd David E. Williams & Company $3\frac{1}{2}$, Clark Brothers 2.

The 23rd David E. Williams & Company $37\frac{1}{2}$, Clark Brothers 6.

The 24th David E. Williams & Company $22\frac{1}{2}$, Clark Brothers nothing.

The 26th David E. Williams & Company 21, Clark Brothers nothing.

The 27th David E. Williams & Company 23, Clark Brothers nothing.

The 28th David E. Williams & Company 33, Clark Brothers 2½.

The 29th David E. Williams & Company 14, Clark Brothers nothing.

The 30th David E. Williams & Company 19, Clark Brothers 5.

The 31st David E. Williams & Company, 44½, Clark Brothers 6.

Q. Total?

A. For Williams & Company 647 cars, Clark Brothers 68.

Q. Days on which Williams received no cars?

A. There are no days here.

Q. Days on which Clark Brothers received no cars?

A. 9 days I believe.

Q. January 1907?

A. January 1907 Williams & Company 22 cars, Clark Brothers nothing.

The 3rd Williams & Company 18½ cars, Clark Brothers nothing.

The 4th Williams & Company 28, Clark Brothers 5.

The 5th Williams & Company 17½, Clark Brothers 3.

The 6th Williams & Company 10½, Clark Brothers nothing.

The 7th Williams & Company 37, Clark Brothers 7½.

The 9th Williams & Company 20, Clark Brothers 3.

The 8th Williams & Company 23½, Clark Brothers 6.

90 The 10th Williams & Company 15, Clark Brothers 5½.

The 11th Williams & Company 45, Clark Brothers 7½.

The 12th Williams & Company 24, Clark Brothers nothing.

The 13th Williams & Company 15½, Clark Brothers nothing.

The 14th Williams & Company 36½, Clark Brothers nothing.

The 15th Williams & Company 33, Clark Brothers 4½.

The 16th Williams & Company 33, Clark Brothers nothing.

The 17th Williams & Company 20½, Clark Brothers 2.

The 18th Williams & Company 29, Clark Brothers nothing.

The 19th Williams & Company 21, Clark Brothers 3.

The 21st Williams & Company 30½, Clark Brothers 2.

I wish to state that from the 19th to the 25th this count was not taken by me on account of being sick, so those reports from the 21st and 24th were taken by Mr. Radcliffe.

Q. Go on and give them any how, if the other side don't object.

A. January 24th Williams & Company 16, Clark Brothers 4½.

The 25th Williams & Company 24, Clark Brothers nothing.

The 26th Williams & Company 7½, Clark Brothers 4½.

The 27th Williams & Company 33, Clark Brothers nothing.

The 28th Williams & Company 29, Clark Brothers 3.

91 The 29th Williams & Company 7½, Clark Brothers nothing.

The 30th Williams & Company 13, Clark Brothers nothing.

The 31st Williams & Company 37, Clark Brothers nothing.

Q. Total.

A. David E. Williams & Company 656½ cars, Clark Brothers 61.

Q. How many days was it Williams & Company failed to get any?

A. Not any.

Q. And Clark Brothers?

A. 13 days.

Q. February?

A. February 1st Williams & Company 13, Clark Brothers nothing.

The 2nd Williams & Company 8, Clark Brothers 3.

The 3rd Williams & Company 20, Clark Brothers nothing.

The 5th Williams & Company 38, Clark Brothers nothing.

The 6th Williams & Company $28\frac{1}{2}$, Clark Brothers $3\frac{1}{2}$.

The 7th Williams & Company $11\frac{1}{2}$, Clark Brothers $1\frac{1}{2}$.

The 8th Williams & Company $16\frac{1}{2}$, Clark Brothers nothing.

The 9th Williams & Company $20\frac{1}{2}$, Clark Brothers 3.

The 10th Williams & Company $31\frac{1}{2}$, Clark Brothers 3.

The 11th Williams & Company $9\frac{1}{2}$, Clark Brothers nothing.

The 12th Williams & Company 22, Clark Brothers nothing.

The 13th Williams & Company $26\frac{1}{2}$, Clark Brothers 3.

92 The 14th Williams & Company $18\frac{1}{2}$, Clark Brothers nothing.

The 15th Williams & Company 3, Clark Brothers nothing.

The 16th Williams & Company 44, Clark Brothers 6.

The 17th Williams & Company 25, Clark Brothers nothing.

The 18th Williams & Company $29\frac{1}{2}$, Clark Brothers $4\frac{1}{2}$.

The 19th Williams & Company $15\frac{1}{2}$, Clark Brothers $1\frac{1}{2}$.

The 20th Williams & Company, $44\frac{1}{2}$, Clark Brothers $4\frac{1}{2}$.

The 21st Williams & Company 20, Clark Brothers $4\frac{1}{2}$.

The 22nd Williams & Company $36\frac{1}{2}$, Clark Brothers 3.

The 23rd Williams & Company $24\frac{1}{2}$, Clark Brothers nothing.

The 24th Williams & Company $22\frac{1}{2}$, Clark Brothers $7\frac{1}{2}$.

The 25th Williams & Company 39, Clark Brothers nothing.

The 26th Williams & Company nothing, Clark Brothers 3.

The 27th Williams & Company $43\frac{1}{2}$, Clark Brothers nothing.

The 28th Williams & Company 23, Clark Brothers nothing.

Total Williams & Company $636\frac{1}{2}$ cars, Clark Brothers $51\frac{1}{2}$.

Q. How many days did Williams fail to get cars that month?

A. One day.

Q. How many days did Clark Brothers miss?

A. 13 days.

Q. Proceed with March?

93 A. March 1907 Williams & Company 31, Clark Brothers $1\frac{1}{2}$.

The 2nd Williams & Company 36, Clark Brothers nothing.

The 4th Williams & Company $38\frac{1}{2}$, Clark Brothers $4\frac{1}{2}$.

The 5th Williams & Company $32\frac{1}{2}$, Clark Brothers 2.

The 6th Williams & Company $19\frac{1}{2}$, Clark Brothers 3.

The 7th Williams & Company $25\frac{1}{2}$, Clark Brothers nothing.

The 8th Williams & Company 28, Clark Brothers $4\frac{1}{2}$.

The 9th Williams & Company 14, Clark Brothers $4\frac{1}{2}$.

The 10th Williams & Company $10\frac{1}{2}$, Clark Brothers nothing.

The 11th Williams & Company $33\frac{1}{2}$, Clark Brothers $4\frac{1}{2}$.

The 12th Williams & Company 12, Clark Brothers $4\frac{1}{2}$.

The 14th Williams & Company 12, Clark Brothers $4\frac{1}{2}$.

The 15th Williams & Company 30, Clark Brothers $4\frac{1}{2}$.

The 16th Williams & Company 37½, Clark Brothers nothing.

The 17th Williams & Company 28½, Clark Brothers nothing.

The 18th Williams & Company 45, Clark Brothers 6.

The 19th Williams & Company 31, Clark Brothers nothing.

The 20th Williams & Company 29, Clark Brothers nothing.

The 21st Williams & Company 17, Clark Brothers 3.

The 22nd Williams & Company 16, Clark Brothers 7½.

The 23rd Williams & Company 11½, Clark Brothers nothing.

The 24th Williams & Company 25½, Clark Brothers nothing.

The 25th Williams & Company 28, Clark Brothers 4½.

The 26th Williams & Company 40½, Clark Brothers 6.

94 The 27th Williams & Company 38½, Clark Brothers nothing.

The 28th Williams & Company 10½, Clark Brothers nothing.

The 29th Williams & Company 9, Clark Brothers nothing.

The 30th Williams & Company 4, Clark Brothers nothing.

The 31st Williams & Company 21, Clark Brothers 7.

Total for Williams that month 715, Clark Brothers 72.

Q. How many days did Williams miss cars that month?

A. Not any.

Q. And Clark Brothers?

A. 13 days.

Q. Take April.

A. April 1st Williams & Company 9, Clark Brothers nothing.

The 2nd Williams & Company 31, Clark Brothers nothing.

The 3rd Williams & Company 6, Clark Brothers 2.

The 4th Williams & Company 12, Clark Brothers 3.

The 5th Williams & Company 16, Clark Brothers 4½.

The 6th Williams & Company 26½, Clark Brothers nothing.

The 7th Williams & Company 25, Clark Brothers nothing.

The 8th Williams & Company 10, Clark Brothers nothing.

The 9th Williams & Company 28, Clark Brothers 4½.

The 10th Williams & Company 22, Clark Brothers 3.

The 11th Williams & Company 37½, Clark Brothers nothing.

The 12th Williams & Company 26½, Clark Brothers 3.

The 13th Williams & Company 61, Clark Brothers nothing.

95 The 15th Williams & Company 31, Clark Brothers 9.

The 16th Williams & Company 40, Clark Brothers 4½.

The 17th Williams & Company 44, Clark Brothers 4½.

The 18th Williams & Company 37½, Clark Brothers 4½.

The 19th Williams & Company 36, Clark Brothers nothing.

The 20th Williams & Company 29½, Clark Brothers 7½.

The 22nd Williams & Company 55, Clark Brothers 4½.

The 23rd Williams & Company 28, Clark Brothers 3.

The 24th Williams & Company 8½, Clark Brothers nothing.

The 25th Williams & Company 25½, Clark Brothers nothing.

The 26th Williams & Company 26, Clark Brothers 4½.

The 27th Williams & Company 30, Clark Brothers nothing.

The 28th Williams & Company 22½, Clark Brothers 6.

The 29th Williams & Company 14, Clark Brothers nothing.

The 30th Williams & Company 18½, Clark Brothers nothing.

Total Williams & Company 765 cars, Clark Brothers 74.

Q. Day on which Williams received none?

A. Not any.

Q. Days on which Clark received none?

A. 12 days.

Q. How many days during this period covering March 1906 and from October 11th, 1906, to April 30th, 1907, did Clark Brothers receive no cars at all?

A. I haven't that counted up. I will count it up. Williams & Company 2 days, Clark Brothers 83.

96 Q. During this period what was the highest number of cars received by Williams & Company when on the same day none was received by Clark Brothers?

A. April 13th, 1907.

Q. How many cars were received that day by Williams?

A. Williams & Company 61 cars, Clark Brothers nothing.

Q. In that day did anyone else on the branch but Williams & Company get cars?

A. No sir.

By Mr. GOWEN:

Q. What date was that?

A. April 13th.

Q. What year?

A. 1907.

By Mr. LIVERIGHT:

Q. Could all those cars be loaded by Williams & Company in a day?

The COURT: Could they or were they?

Mr. GOWEN: I object to that. I thought you asked were they.

By Mr. LIVERIGHT:

Q. Were they loaded by Williams & Company on that day?

A. Not the following day they were not.

Q. How many were loaded?

A. They had 16 steel cars left over, which would be 24 cars.

Q. And the day succeeding that how many cars did they get?

97 A. You mean on the——

Q. 14th of April?

A. I have no record of the 14th of April.

Q. Yes, you have it on your first page there?

A. The 14th?

Q. Or 15th, how many did they get?

A. They received 31 cars, Clark Brothers received none.

Q. How many did they have to start work with?

A. On what morning?

Q. On the 15th?

By the COURT:

Q. I understood you to say there was 16 steels standing over?

A. On the morning of the 15th they had 16 steels left over from

the 13th, which would be 24 cars, and they had placed for to start on that morning they had 55 cars.

By Mr. LIVERIGHT:

Q. 55 cars to load that day?

A. Yes sir.

Q. And the following day how many did they get?

A. On the 16th?

Q. Yes?

By Mr. O'LAUGHLIN:

Q. 55 placed that morning?

A. No sir, on their siding. On the 16th they received 48½ cars.

By Mr. LIVERIGHT:

Q. And how many did they have over that morning from the 55 that were on their sidings the day before?

A. How many did they have over?

98 Q. Yes?

A. 20 cars.

Q. And on the 16th they had a total on hand of cars over and cars received of 68½ cars, didn't they?

A. On the morning of the 17th they would have that.

Q. How many did they load that day of the 68½?

By the COURT:

Q. On the 16th how many did they load?

A. There was 32 left on the siding. That would leave them loading 36½ cars.

By Mr. LIVERIGHT:

Q. They had 32 left over on the sidings for the next day?

A. Yes sir.

Q. And on the next day how many did they get?

A. That would be the 17th they received this, they received 44 cars

Q. That left them with a supply that day of 76 cars, didn't it?

A. 76 cars, yes sir.

Q. How many of the 76 cars were left over?

A. There were 40 cars left over.

Q. Out of the 76?

A. Yes, they loaded 36 cars.

Q. How many did they get on the 18th?

A. The 18th they received 37½.

Q. And they had on hand for that day a total of 77½ cars, didn't they, including what was over from the day before?

A. 77½ cars.

Q. How many were loaded on the 18th?

A. There were 41½ left over.

99 Q. 41½ left over?

A. That let them load 36 cars.

- Q. That is to say, on the 19th they had 41½ left over?
- A. Yes sir.
- Q. And they got 36 on the 19th?
- A. They got 36.
- Q. That left them with a supply of 77½ cars for the 19th?
- A. Yes sir.
- Q. Now that same day how many cars did Clark Brothers get?
- A. On the 19th?
- Q. Yes, the day Williams had 77½ in hand for loading?
- A. Didn't receive any.
- Q. How many of those 77½ were loaded on the 19th?
- A. They had 37 left over.
- Q. Of the 77½, was that?
- A. Yes. They loaded 40½.
- Q. Well that left them with 37 to start the 20th?
- A. Yes sir.
- Q. They got 29½ that day, according to the statement you read. That gave them a supply that day of how many?
- A. 66½
- Q. How many of those did they load on the 20th?
- A. They had 34 remaining on their siding.
- Q. They loaded 32½?
- A. 32½.
- Q. That is to say, on the morning of the 22nd they had 32½ to start work with?
- A. Yes sir.
- Q. 34 to start and how many did they load that day, the 22nd?
- A. They received 55.
- 100 Q. That is they had a supply of 89 cars on the morning of the 22nd to load?
- A. On the morning of the 23rd.
- Q. The 22nd?
- A. But these 55 cars was generally placed in the afternoon.
- Q. Well during the day. Cars left over and cars placed during the day, whether it would be morning or afternoon, they had a total supply of 89 cars, didn't they?
- A. Yes sir.
- Q. Are you sure these were the Williams & Company sidings got these?
- A. Positively.
- Q. They weren't storage sidings of the Pennsylvania Railroad Company?
- A. No sir, not unless those sidings at each and every one of the mines were storage sidings of the Pennsylvania Railroad.
- Q. To the best of your knowledge they were mine sidings of the Williams operations?
- A. Yes, those mine sidings were used by the coal companies. As the cars were loaded they would drop them through under their tipple.
- Q. Isn't it a fact that during this time the mine sidings were so choked with empty cars waiting to be loaded at the Williams mines

that the trains would extend on to the main track, of the branch I mean, beyond the tippie?

A. Yes, they have had them standing below the tippie ready to be pushed up whenever the trains would come. They couldn't get them all in their sidings and they would pull them back and leave them standing there until they would come with other trains and shove them up. There are only three mines which they would do that at, Urey No. 1, Glenwood No. 9 and Glenwood No. 4.

Q. State whether or not it was a frequent occurrence throughout the period which you counted cars, apart from the particular
101 days to which I directed your attention, that the cars on hand and received on a particular day were not all loaded that same day?

A. No, they were not all loaded.

Q. The question was whether that was a frequent occurrence or not?

A. Yes, quite frequently these things would happen.

* * * * *

102 A. M. RIDDLE called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. What is your business?

A. Mine Superintendent.

Q. For what Company?

A. Glenwood Coal Company and Urey Ridge. Forge Coal Mining Company and Cymbra Coal Company.

Q. In 1905, '6 and '7 what position did you hold?

A. Superintendent of Glenwood and Urey Ridge mines.

Q. Who operates these mines?

A. Those are the companies operate them, the Glenwood Coal Company and the Urey Ridge Coal Company.

Q. Who arranges their car supply or did arrange their car supply for them between October 1905, and May, 1907?

A. We ordered them from the office.

Q. Did D. E. Williams & Company have anything to do with that?

A. They were the selling agents.

Q. They were the selling agents?

A. Yes sir.

Q. Were the stockholders of the Williams Company also stockholders of the Glenwood and Urey Ridge Company?

A. Yes sir.

Q. Was all the coal of the Glenwood and Urey Ridge Company handled by David E. Williams Company?

A. Yes sir, that is where we got our orders from.

103 Q. Where are your mines situated, can you show us on the map that is hanging there?

A. This is part of the properties.

Q. What mines are on there?

- A. That is No. 11.
Q. On what run is that?
A. Well it is on the upper end of Brady Run.
Q. Where was Glenwood No. 9?
A. Glenwood 9 was on the lower end of Brady Run.
Q. Where was No. 4?
A. No. 4 was just above Glen Campbell on Graham Run. This coal at No. 11 was loaded on No. 4 tipple.
Q. Where was No. 10?
A. No. 10 was at Burnside.
Q. Where are Urey Ridge mines?
A. They are up in here. They are not shown on here.
Q. Not shown on this map?
A. No sir.
Q. They are east of the Glenwood mines, are they?
A. Yes sir.
Q. Was there only one ridge of hills between?
A. Between Glenwood and Urey, yes sir.
Q. What were the names of the Urey Ridge mines
A. Urey No. 1, 2, 3 and 5.
Q. Where were they located?
A. Then there was No. 6 later on. I don't know just what time No. 6.
Q. Were they all located close together?
A. Yes all on that ridge, what is called the McCoy Run.
Q. You have mentioned now Glenwoods 4, 9, 10, and 11, and Urey Ridge 1, 2, 3, 5 and 6. Which of these mines was in active operation in October, 1905?
104 A. Well to the best of my recollection there was No. 1 that came out on No. 1 tipple. Then 2, 3 and 5 came out on No. 5 tipple, we call No. 3 tipple.
Q. Were 2, 3 and 5 all active?
A. All connected, yes sir.
Q. Were they all active?
A. Yes sir, all working.
Q. How nearly exhausted was No. 2?
A. Well the upper end was pretty well exhausted up next to Urey No. 1, and below that from that tipple down was worked to No. 5, worked through No. 5 down on No. 3 tipple. I can't just tell you how close it was exhausted.
Q. Do you know what your car rating was for Urey 2, 3 and 5 in the fall of 1905?
A. To the best of my recollection or to the best of my knowledge it was 22 cars.
Q. A day?
A. Yes sir.
Q. What was your car rating at that time at Urey No. 1?
A. 10 cars I believe.
Q. What was your car rating at Glenwood mines?
A. No. 4 was 8 and No. 9 was 5.
Q. No. 10 and 11 were no longer in existence, were they?

A. No. 11 was. It came to No. 4 tipple, you know. That was loaded at No. 4.

Q. It was included in the rating of 8 cars given No. 4?

A. There was 3 or 4 mines came on that one tipple.

Q. Altogether they had a rating of 8 cars?

A. Yes sir.

Q. Then, as I understand it, your total rating at that time would have been about 45 cars a day?

A. Yes.

Q. Is that correct?

A. About 45 cars, yes sir.

105 Q. No. 6 mine started when?

A. Urey No. 6?

Q. Yes?

A. I really can't tell you that. I don't know just when.

Q. When you had from 50 to 89 cars on the sidings at your various mines for loading on a particular day, you had twice your rating as given you by the Railroad Company, didn't you?

A. If we would have 80 cars in, we would have about.

Q. Twice your rating?

A. Yes sir, if we had 80 cars, we would.

Q. And any number of cars on the tracks on your sidings on particular days in excess of 45 would have been in excess of your rating?

A. Yes sir.

Q. What do you understand this rating to mean when it says 45 cars; 45 ears of any particular size?

A. I understand the rating was about 35 net tons to the car.

Q. 35 net tons?

A. Yes sir.

Q. Beginning when?

A. I don't know just when that began.

Q. What were your average daily shipments from these mines?

A. I don't know. I don't have that.

Q. Can you figure that up for us?

A. It would be only guess work. I might figure it from a report I have here of the monthly shipments.

Q. Please do so?

A. Any particular month or time?

Q. Start at November, 1905?

A. The shipments for the month of November would average about 16 cars a day.

Q. 16 cars a day?

A. Yes sir.

106 Q. Of 35 tons each?

A. That is just the number of cars shipped during the month. Taking 26 days in the month that averaged 16 cars to the day.

Q. How much did they average each month after that?

A. Each month? 21 cars a day in December. 18 and a fraction in January. About 14 in February. 22 in March.

Q. August now?

A. 10 a day in August. 13 in September. 11 in October. 10 in November. 27 in December. 24 in January. 19 in February. 22 in March. About 23 in April.

Q. Now in April, 1907, you say your shipments averaged 23 cars a day?

A. Yes sir.

Q. And your rating was 45 cars a day?

A. Yes sir.

Q. Did you hear the testimony of Mr. Bryson to the effect that during that month for a stretch of a large number of days you had any where from 45 to 89 cars each day standing on the siding?

A. No, I wasn't in here all the time he was giving his evidence. I didn't hear it.

Q. Is that a fact?

A. I couldn't say so. I don't know it to be a fact.

Q. Mr. Bryson did so testify and assuming that this testimony is true, why is it you didn't load any more coal in the month of April, 1907?

A. I don't know. It might have been we didn't have the orders. I don't know, I can't tell you just now.

Q. Do you think day in and day out your mines could have produced 45 cars 35 tons capacity 26 days to the month at this time?

A. I don't know. This is back of 1906, it is a little hard to remember without any records.

107 Q. What is your best recollection about it?

A. Well I would think that we could load at least from 35 to 40 cars.

Q. 35 to 40?

A. I would think so.

Q. It would hustle you to do that day in and day out?

A. I don't know. We ought to have been able to keep that up at that time.

Q. 45 cars is a little bit large, isn't it, as a rating?

A. Well from the evidence it looks as though it might be a little large. I don't know whether it was at all. I couldn't tell you that?

Q. Have you any record to show that in any period of a week or 10 days for two or three successive days you loaded 45 cars each day?

A. I have no records at all with me of anything.

Q. Where are your records?

A. I don't have them.

Q. Where are they?

A. I guess they are all destroyed. Our old records are all destroyed now.

Q. Were you subpoenaed to produce them?

A. No sir.

Q. Do you have any recollection of such an occurrence that for three successive days your mines loaded as much as 40 cars per day in this period?

A. Yes, I think they did.

Q. During this period?

A. I think so.

Q. You think they did?

A. Yes sir.

Q. Do you know what month?

A. No, I couldn't tell you that off hand.

Q. Or what year?

A. About that period you say along in 1906.

Q. How many days did you figure for April, 1907?

108 A. I figured them all here at 26 days.

Q. Every month?

A. Yes sir.

Q. Excepting February, I suppose?

A. I didn't think of February and I figured it the same.

Q. Where are the records showing the actual shipments of your mines?

A. This is all the records I have.

Q. That doesn't answer the question?

A. Well I said they were all destroyed, all our previous records were all destroyed and this is the only record I have.

Q. When were they destroyed?

A. Soon after that other suit they had here four years ago.

Q. Burned up?

A. Yes sir.

Q. That is destroyed by the Company for its own reasons?

A. On account of the accumulation of rubbish in the building, we cleaned it all out, a lot of stuff we had back for 2 or 3 years.

Q. Burned your books too?

A. Yes sir. We don't have any use of them after the report is made to our Philadelphia office. After two or three months we don't have any use of that record and we destroy them right away.

Q. Have you a statement with you showing the shipments of coal by the Glenwood and Urey Ridge Companies covering a period from October, 1905, to May, 1907?

A. Yes sir, that is included in this. It covers from 1903 to 1907.

Q. Start with October, 1905, and state month by month the shipments of coal by the Glenwood Coal Company on account of commercial trade?

109 A. Commercial trade? October, 1905, 128 cars.

Q. Supply coal for same month?

A. 15 cars P. R. R. supply coal.

Q. Proceed the same way for the balance of the period?

A. November 92 commercial, 43 supply. December 72 commercial, 57 supply.

Q. Now just a moment. These shipments are divided into steel and wood cars, are they?

A. Yes sir.

Q. And the steel car counts as a car and a half, don't it?

A. Well I just totaled them here as cars, car for car.

Q. You are counting them just as separate cars?

A. Yes sir.

Q. Suppose under the circumstances you state how many steels and how many woods. How many steel in October?

A. October 60 steel, 68 wood, that makes a total of 128 commercial cars. Supply coal was 11 steel and 4 wood. November 61 steel and 31 wood. Supply coal 39 steel and 4 wood. December 53 steel and 19 wood. Supply coal 55 steel and 2 wood. January, 1906, 37 steel and 23 wood, 31 foreign cars. Supply coal 47 steel and 25 wood.

By Mr. O'LAUGHLIN:

Q. 31 foreign?

A. Yes sir.

Q. Was that commercial?

A. Yes sir. February steel 76, wood 49. Supply coal, steel 17, wood 4. March, steel 72, wood 83. Supply coal, steel 23, wood 19. April, May and June was strike.

110 By Mr. LIVERIGHT:

Q. Omit July too, please?

A. August, 48 steel, 43 wood. Supply coal, 32 steel, 6 wood. September, 43 steel, 91 wood. Supply coal, 14 steel, 1 wood. October, 74 steel, 75 wood. Supply coal, 1 steel. November, 77 steel, 40 wood. No supply coal that month. December, 54 steel, 39 wood, 42 foreign cars. Supply coal, 41 steel, 9 wood.

Q. Were those foreign cars commercial?

A. Yes, went to commercial trade.

Q. 1907?

A. January, 99 steel, 76 wood, 33 foreign cars. P. R. R. supply, 45 steel, 5 wood. February, 37 steel, 10 wood, 89 foreign cars. Supply coal, 28 steel, 2 wood. March, 42 steel, 50 wood, 46 foreign cars. Supply coal, 60 steel, 12 wood. April, steel 32, wood 57, foreign 30. Supply coal, steel 35, wood 5. That is all I have of the Glenwoods.

Q. All these foreign cars to which you have testified were commercial coal?

A. I think so, yes sir. They are marked here commercial.

Q. The Urey Ridge Company, give the tabulations in the same manner, if you can?

A. October, commercial 63 steel, 80 wood cars, 17 foreign. Supply coal, 50 steel, 16 wood. November, steel, 51, wood 59, foreign 127. Supply coal, steel 46, wood 1. December, steel 50, wood 80, foreign 292. Supply coal, 1 wood car. January, 1906, steel 27, wood 33, foreign 192. Supply coal, steel 30, wood 35. February, steel 62, wood 34, foreign 74. Supply coal, steel 31, wood 14. March, steel 97, wood 42, foreign 223. Supply coal, steel 10, wood 2 and foreign 1.

Q. August?

A. August, steel cars 88, wood 19. Supply coal, steel 23, wood 11. September, steel 70, wood 61. Supply coal, steel 34, wood 23.

111 October, steel 83, wood 24. Supply coal, steel 34, wood 7. November, steel 50, wood 39. Supply coal, steel 38, wood 24.

December, steel 44, wood 25, foreign 143. Supply coal, steel 52, wood 9. January, 1907, steel 109, wood 31, foreign 196. P. R. R. supply, steel 40. February, steel 61, wood 7, foreign 222. Supply coal, steel 37, wood 4. March, steel 70, wood 50, foreign 164. Supply coal, steel 56, wood 17. April, steel 126, wood 27, foreign 171. Supply coal, steel 55, wood 3.

Q. Does that cover all the coal shipped from the Glenwood and Urey Ridge mines during the period mentioned?

A. It does, yes sir.

Q. What character of shipments were those in foreign cars from the Urey Ridge Coal Company's operation that you have just enumerated?

A. What was the question?

Q. Were they commercial shipments?

A. Yes sir, so marked here.

Q. I understood you to say a little bit ago that these operations were slightly over-rated, that 35 to 40 cars per diem would probably cover their capacity. Which ones are over-rated, that is the Glenwood or Urey, that is, which ones should be reduced?

A. Well I don't know. I couldn't just answer that question at that time.

Q. You might look at that, if you wish. Are you able to answer that now?

A. I see here that Glenwood No. 4 was rated at 8 cars in 1906 and 1907, 8 steel cars I presume they were or 8 cars it is marked. I think that is under-rated, that mine is under rated at time.

By Mr. O'LAUGHLIN:

Q. What number?

A. It is marked here Glenwood No. 4.

112 By Mr. LIVERIGHT:

Q. Are you able to specify just where the cut ought to be made, in which of the mines?

A. It is possible that Urey No. 3 and 5 was a little bit high there.

Q. What are they?

A. They are marked 22 or 23 cars. 22 cars part of the time and 23 cars part of the time.

Q. Would 15 cars cover that day in and day out?

A. No, I don't believe it would in 1906.

Q. Would 17?

A. I would say about 18 any how.

* * * * *

113 By Mr. GOWEN:

Q. And you say you are not familiar with the manner in which the Railroad Company arrived at the rating?

A. No sir, I do not know that.

Q. You stated in answer to a question put by Mr. Liveright that you thought one of your mines was under-rated. Which one was that, Glenwood No. 9?

A. No, No. 4.

Q. Glenwood No. 4 and that you thought Ureys No 1, what other numbers?

A. Urey No. 1 I thought was all right, 10 cars a day. No. 2 was a little over, about 4 cars over.

Q. You thought a fair rating would be 18 cars rather than 22?

A. Yes sir.

Q. You say you don't know how the Railroad Company arrived at that rating of 22 cars?

A. No sir.

Q. Now can you recall the physical condition of the mine during that period, that is Urey No. 2?

A. 2, 3 and 5.

Q. 2, 3 and 5?

A. Yes, there was a great deal of coal in the mine.

Q. When you say you think they were over-rated to the extent of 4 cars, do you mean to say you think they couldn't day in and day out, considering all the conditions of the trade, have shipped 22 cars, or do you mean the mine if you had a full supply of men, that the mine wasn't capable of producing 22 cars a day?

A. No, I don't think it would. I think about 18 a day.

Q. You think 18?

A. Yes sir.

Q. You think that was the real capacity?

A. Yes sir.

Q. The real fair rating?

A. To the best of my knowledge.

* * * * *

114 W. J. TREVESSICK called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?

A. Glen Campbell.

Q. What is your occupation?

A. Superintendent and mine foreman.

Q. How long have you been in the Glen Campbell region?

A. 23 years.

Q. Are you acquainted with the Patchin tract on which Nos. 5 and 6 Falcon are located?

A. I am.

Q. How long have you known that tract of land?

A. 23 years.

Q. Were you acquainted with it in 1905, '6 and '7?

A. I was very much.

Q. At the beginning of this action, about October 16th, 1905, in your judgment what veins of coal were upon that property that could be worked out?

A. The "C" Prime, the "D" and "E."

Q. How many acres of the "C" Prime?

A. About 40 or 45 acres.

- Q. What thickness?
A. About 5 feet.
- Q. What is the quality of this coal?
A. It is an excellent quality.
- Q. In your judgment how many acres of that, if any, remained still to be mined?
A. About 25 or 30 acres I should judge.
- Q. How many acres of the "D" vein were there in the winter of 1905 and '6?
A. Any where from 50 to 75 acres.
- Q. How much, if any, of that has been removed?
A. Well now there has been a few acres of it removed, probably 3 or 4 acres, something like that.
- Q. Is the rest of it still in place?
A. Yes sir, still in place.
- Q. Minalbe?
A. Yes sir.
- Q. What is the thickness of this coal?
A. About $3\frac{1}{2}$ feet.
- 115 Q. What is its quality?
A. It is fairly good quality of coal.
- Q. Is the "E" vein opened up in this vicinity?
A. It is.
- Q. How many acres of it, if any, were there upon the Patchin tract in the winter of 1905 and '6?
A. About 35 or 40 acres I should judge.
- Q. How many are still there to be mined?
A. Any where from 35 to 40 acres I should judge.
- Q. All still there practically?
A. That is of the "E"?
- Q. Yes?
A. Yes sir.
- Q. What is the thickness of this vein?
A. It would run any where from 3 feet 6 to 3 feet 8 and 4 feet, along there it varies.
- Q. And the quality?
A. It is a good quality of coal.
- Q. State whether or not in your judgment all these veins of coal were both workable and merchantable?
A. They are.
- Q. About how many tons per foot per acre thereof can be taken out safely?
A. How many tons per acre?
Q. How many tons per foot per acre?
A. About 1,000 to the foot.
- Q. State whether or not, in your judgment, all of this coal to which you have testified, if it had been desired by the interested parties, could have been removed at No. 5 tippie?
A. It could have been, yes.
- Mr. GOWEN: No cross-examination.

116 J. O. CLARK recalled on part of plaintiff.

By Mr. LIVERIGHT:

Q. What was the distribution regulation that was in force on the part of the Pennsylvania Railroad beginning January 1st, 1906?

A. That rule was to divide the cars into two classes, assigned and unassigned. The assigned cars consisted of P. R. R. fuel cars, foreign railroad specially consigned to the fuel supply of railroads consigning such cars, and individuals cars. Those assigned cars were charged against the rated capacity of the mine. The remainder of the rated capacity of that mine being available for system cars.

Q. That is for prorating?

A. For prorating, yes sir.

Q. That is to say, if a mine was rated at 1000 tons and the assigned cars that were sent in to it absorbed 750 tons of its capacity, there remained 250 tons to apply as the rating of that mine for unassigned cars?

A. Yes sir.

Q. And if that mine had 250 tons for unassigned cars and there was another mine that had a like number of tons and there were 10 unassigned cars came in, those two being the only two mines on the branch each of them would get one half of the 10 cars?

A. They each should get one-half of the 10 cars, but that didn't occur.

Q. Under the rule I mean?

A. Under the rule that is what should occur.

Cross-examination.

By Mr. GOWEN:

Q. Did that rule that you have referred to apply up till May 1st, 1907?

A. I so understand it, yes sir.

Q. Was it in force before January 1st, 1906?

A. Not to my knowledge.

Q. What rule was in force that covered distribution?

A. I don't believe I am familiar with that rule.

Q. Well, Mr. Clark, during the period between January 1st, 1906 and May 1st, 1907, was the defendant making distribution under that rule?

117 A. Were they?

Q. Yes.

A. They didn't make distribution of the system cars to our mines under that rule. I don't think they made a distribution to our mines under any rule.

Q. Well I mean that was the rule in force and they were making a percentage distribution throughout the period?

Mr. LIVERIGHT: We object to the question as not cross-examination. The examination of the witness was confined to the regulation that was promulgated by the Company, not how the Company operated under it.

Mr. GOWEN: I won't press the question.

118 J. R. RATEW called on part of Plaintiff, being duly sworn and examined, testified as follows:

Mr. LIVERIGHT: We would like to offer in evidence on part of Plaintiff Exhibit No. 29.

Q. Where do you live?

A. Atco, New Jersey.

Q. In 1905, 6 and 7 were you connected with the Clark Brothers Coal Mining Company?

A. Yes sir.

Q. How?

A. I was their accountant.

Q. Were you secretary of the Company?

A. Yes sir, I was also secretary of the Company.

Q. Are you connected with them at this time?

A. No sir.

Q. Did you have charge or partial charge of their shipment records and accounts generally?

A. Yes sir.

119 Q. And pay rolls?

A. Yes sir.

Q. Car receipts?

A. No sir I didn't have charge of the car receipts directly, although they were sent to the office. They were only filed away. I was not interested in that.

Q. You didn't know what the car receipts were at the mines?

A. No sir.

Q. You received the reports at the office, did you?

A. Yes sir.

Q. In Philadelphia?

A. Yes sir.

Q. Were you here when the testimony was offered by Mr. Chase in regard to the car receipts at the Berwind mines?

A. You mean here in Court?

Q. In Clearfield?

A. Yes sir.

Q. Have you taken a duplicate of the exhibit I hand you, marked Exhibit 29, for the purposes of calculation?

A. Yes sir.

Q. Have you made a calculation of the pro rata of unassigned cars received at all the Berwind mines in the months of January, February and March, 1906, preceding the strike?

A. Yes sir.

Q. How have you gotten at that?

A. I took the total rating of the Eureka mines Nos. 7, 16, 22, 27 and 28 of 2100 tons a day and took the working days of the month.

Q. For instance, in January?

A. In January, which amounted to 54,600 tons for the month and the individual cars which they received for that month amounted to 43,435 tons and the fuel cars 6387 tons.

120 Q. What percentage of their capacity did they receive that month in assigned cars?

A. 91 $\frac{2}{10}$.

Q. How much capacity did they have left for unassigned cars?

A. 4778 tons.

Q. How much did they receive in unassigned cars?

A. 7368 tons.

Q. What percentage of their capacity did they receive in unassigned cars?

A. 154 $\frac{2}{10}$ per cent.

Q. What per cent?

A. 154 $\frac{2}{10}$.

Q. For the month of January, 1906, is that?

A. Yes sir.

Q. Is that a compilation of all the Eureka mines involved in this litigation?

A. Yes sir.

Q. Now in the same way let us have your results reached for February, 1906?

A. Figuring the rating at 2100 tons per day, the rating for February was 50,400 tons. The individual cars they received were 45622 tons, fuel cars 4060 tons, which was 98 $\frac{5}{10}$ per cent.

Q. Now what do you mean by 98 $\frac{5}{10}$ per cent?

A. The individual and fuel cars amounted to 98 $\frac{5}{10}$ per cent of their entire rating.

Q. That is to say, they received assigned cars to absorb 98 $\frac{1}{2}$ per cent of their total capacity?

A. Yes sir.

Q. What rating did that leave them for unassigned cars?

A. 718 tons.

Q. What tonnage did they get in unassigned cars?

A. 4742 tons.

121 Q. What is the ratio of unassigned cars received to unassigned capacity?

A. 660 $\frac{4}{10}$ per cent.

Q. That is, in that month the Berwind mines got 660 $\frac{4}{10}$ per cent of their rating?

A. Yes sir.

Q. Take March, 1906, in the same way?

A. The total rating for the month was 56,700 tons. Individual cars 47,042 tons, fuel cars 4462 tons. That was 90 $\frac{8}{10}$ per cent of their entire rating.

Q. 90 and how much?

A. 90 $\frac{8}{10}$. That left them 4196 tons for unassigned car rating.

Q. How much did they receive?

A. They received 5547 tons.

Q. What percentage was that of their capacity for unassigned cars?

A. 132 $\frac{2}{10}$ per cent.

Q. Have you made up tables this same way to show the relation

of the tonnage received to the rating of Eureka mine No. 7 beginning with January 1st 1906?

A. Yes sir.

Q. Is this one of the mines that has been mentioned here as competitive with Falcon No. 2?

A. Yes sir.

Q. Beginning January, 1906, go over those figures for that month?

A. Total rating for the month was 10,400 tons. They received in individual cars 4795 tons and fuel cars 6387 tons, or 107 5/10 per cent of their rating.

Q. What do you mean by that?

A. They received more cars than they are entitled to under their rating.

Q. You mean they received more tonnage than the capacity of their mine?

A. More tonnage than the capacity of their mine.

122 Q. And received it in assigned cars?

A. Yes sir.

Q. Did they have any capacity left for unassigned cars?

A. No sir.

Q. Did they receive any unassigned cars?

A. Yes sir.

Q. To what extent in tons?

A. 1295 tons.

Q. What is the relation of the unassigned cars received to their capacity or rating for that class of cars; can you express it?

A. No, only up as high as you want to go.

Q. They had no rating at all and received cars against that nothing?

A. Yes sir.

Q. Go over February, 1906, and state what you find to be the facts there?

A. The total rating for the month was 9600 tons. Received in individual cars 4572 tons. I want to correct that, I think that is 4672, the typewriter copy is indistinct. 4672 it ought to be, and individual cars they received 4060 tons, which was 90 9/10 per cent of their entire rating.

Q. What capacity or rating had they left for unassigned cars?

A. 868 tons.

Q. What tonnage did they receive for unassigned cars?

A. 1907 tons.

Q. What per cent was that of their capacity?

A. 219 7/10 per cent.

Q. March, 1906?

A. Entire rating for the month was 10,800 tons. They received in individual cars 6405 tons, for fuel coal 4462 tons, that being 100 6/10 per cent of their rating.

123 Q. Did they have any capacity left for unassigned cars?

A. No sir.

Q. Did they get any unassigned cars?

A. Yes sir.

Q. What tonnage?

A. 1400 tons.

Q. December, 1906?

A. Their entire rating for the month was 10,000 tons. They received in individual cars 8155 tons, in fuel cars 315 tons. That was $84\frac{7}{10}$ per cent of their rating.

Q. Leaving a balance for unassigned cars of how much rating?

A. 1530 tons.

Q. And how many tons did they receive against that rating?

A. 1172 tons.

Q. What per cent is that?

A. $78\frac{6}{10}$ per cent.

Q. January, 1907?

A. The rating for the month was 10,400 tons. They received in individual cars 4532 tons, fuel cars 665 tons. $49\frac{9}{10}$ per cent of their rating.

Q. Leaving for unassigned rating?

A. 5203 tons.

Q. Against which they received how much in unassigned cars?

A. 4585 tons.

Q. What per cent?

A. Or $88\frac{1}{10}$ per cent.

Q. February, 1907?

A. The total rating for the month was 9600 tons. They received in individual cars 3672 tons, and fuel cars 892 tons, or $50\frac{6}{10}$ per cent of their rating. That left them for unassigned cars 4736 tons.

124 Q. How much did they receive?

A. They received 1907 tons.

Q. What percentage of their unassigned rating was that?

A. $40\frac{2}{10}$ per cent.

Q. March, 1907?

A. The entire rating for the month was 10,400 tons. They received in individual cars 8680 tons, in fuel cars 822 tons or $91\frac{3}{10}$ per cent of their rating. That left them for unassigned cars or for unassigned rating 898 tons, on which they received 1907 tons.

Q. A percentage of what?

A. Or $212\frac{3}{10}$ per cent of their rating.

Q. On the same basis what was the percentage of unassigned cars they received in April, 1907?

A. $39\frac{3}{10}$ per cent.

Q. Have you made up a table of the same kind for Eureka mine No. 27?

A. Yes, that is not quite completed though.

Q. You will have it here in the course of the morning?

A. Yes, it will be here in half an hour.

Q. Have you made a table of the same kind for Eureka mine No. 28?

A. Yes sir.

Q. Beginning January, 1906, state what percentage of their capacity for unassigned cars they received in unassigned cars?

A. In January, 1906, 139 2/10 per cent.

Q. In February and March, 1906, did they have any capacity left for unassigned cars?

A. No sir.

Q. That is to say, their entire rating was absorbed by assigned cars?

A. Yes sir.

125 Q. Did they receive any unassigned cars?

A. Yes sir.

Q. How much?

A. In February 1785 tons. In March 2695 tons.

Q. What was their percentage in November, 1906, of unassigned cars received compared to unassigned car capacity?

A. 76 8/10 per cent.

Q. December?

A. 78 1/10 per cent.

Q. January, 1907?

A. 61 7/10 per cent.

Q. February?

A. 42 3/10 per cent.

Q. March?

A. 57 7/10 per cent.

Q. April?

A. 110 1/10 per cent.

Q. Is a table being made up showing the car receipts of the Falcon mines 2, 3 and 4 for the same period?

A. Yes sir.

Q. Do you know when that will be finished?

A. It will be finished by lunch time.

Q. Have you made up a table along the same lines showing the percentage of unassigned cars received at the Glenwood Coal Company mines during the period of the action?

A. Yes sir.

Q. Also one showing the percentage of cars received at the Falcon No. 5 mine during the period of the action?

A. Yes sir.

Q. Were there any assigned cars received by No. 5?

A. No sir. You mean Falcon No. 5?

Q. Yes?

A. No sir.

26 Q. Were there foreign and assigned cars received by the Glenwood Coal Company's mines?

A. Yes sir.

Q. On what rating basis have you made up this tabulation?

A. The Glenwood Coal Company?

Q. Yes?

A. Glenwood Coal Company mines I rated their No. 4 as 8 cars per day and No. 9 as 5 cars per day.

Q. Was that the rating testified to yesterday by Mr. Riddle the superintendent?

A. I am not certain of that. I didn't hear all his testimony.

Q. Is that the rating that appears on the Railroad Company's sheets?

A. I don't know that. I don't recall that.

Q. Well the record will show the testimony of Mr. Riddle on the subject. Beginning with January, 1906, which was the first date of which we have any record knowledge at this time the rule of assignment in force, what was the percentage of foreign and assigned cars received at the Glenwood Coal Company's mines month by month?

A. You mean foreign and assigned cars?

Q. Yes?

A. I haven't got that percentage worked out.

Q. Not percentage. Cars I mean. Give the number of foreign and assigned cars received?

A. Commencing with January, 1906?

Q. Yes?

A. 126½ cars. February 29½ cars. March 53½ cars. August 54 cars. September 22 cars. October 1½ cars. November not any. December 122½ cars. January, 1907 113½ cars. February 152 cars. March 155 cars and April 91½ cars.

127 Q. Was it possible for you, from the evidence presented in this case, to separate the foreign cars into steel and wood?

A. Yes sir.

Q. In what months?

A. I took Mr. Bryson's testimony and itemized that along with this or along with Mr. Riddle's.

Q. In those months which Mr. Bryson did not count cars did you differentiate between steel and line or count a car a car?

A. No sir, I counted a car a car.

Q. That is to say, a steel car counted as one?

A. I did, unless Mr. Riddle's testimony showed it. The foreign cars didn't separate the steel from the line cars.

Q. Now after these assigned cars were taken off the ratings of the Glenwood Coal Company's mines was there a capacity or rating left for unassigned cars?

A. Yes sir.

Q. Were cars received against that rating?

A. Yes sir.

Q. Give us month by month the percentage of unassigned cars received at the Glenwood mines and immediately thereafter the percentage of unassigned cars received at Falcon No. 5 mine?

A. Glenwood mines for January, 1906, was 37 1/10 per cent. Falcon No. 5 I didn't figure January, because we only shipped 2 cars from that mine. In February, 1906, Glenwood 57 7/10 per cent. Falcon No. 5, 30 4/10 per cent. March, Glenwood 64 5/10 per cent. Falcon No. 5, 30 7/10 per cent. August, for Glenwood 38 7/10 per cent, Falcon No. 5, 28 7/10 per cent. September for Glenwood 51 3/10 per cent, Falcon No. 5, 3 3/10 per cent. October, Glenwood 53 2/10 per cent, Falcon No. 5, 17 3/10 per cent. November Glen-

wood 48 9/10 per cent, Falcon 17 9/10 per cent. December Glenwood 59 5/10 per cent, Falcon No. 5 24 6/10 per cent. 128 January 1907, Glenwood 100 per cent, Falcon No. 5, 27 3/10 per cent. February, Glenwood 40 9/10 per cent, Falcon No. 5, 20 6/10 per cent. March, Glenwood 61 7/10 per cent, Falcon No. 5, 25 per cent. April, Glenwood 73 per cent, Falcon No. 31 per cent. I would just like to say that means Falcon No. 5 and 6.

Q. Was there any capacity at Falcon No. 5 mine in January, 1906, when you said they got only 2 cars?

A. I don't know whether they were operating the entire month or not. They only made shipments of 2 cars, which amounted to 70 8/10 tons.

Q. Have you from the books of the Clark Brothers Coal Mining Company made up a statement showing the average shipments in tons for each working day per month, from the Falcon mines 2, 3, 4 and 5?

A. Yes sir.

Q. Will you set forth and state what the shipments were per day beginning with Falcon No. 2 mine, October 16th to 31st, 1905?

A. Take that entire mine before I go to the other, or cross right across?

Q. Go across the column?

A. From October 16th to 31st, 1905, Falcon No. 2 mine 109 89/100 tons per day. Falcon No. 3, 11 46/100 tons per day. Falcon No. 4 and 5 were not in operation that month. November, 1905, Falcon No. 2, 77 31/100 tons per day. Falcon No. 3, 5 88/100 tons per day. Falcon No. 4 and 5 not in operation. December, 1905, Falcon No. 2, 67 26/100 tons per day. Falcon No. 3, 4 86/100 tons. Falcon No. 4 and 5 not in operation. January, 1906, Falcon No. 2, 92 11/100 tons. Falcon No. 3, 7 158/1000 tons. Falcon No. 4, 38 59/100 tons. Falcon No. 5, 35 40/100 tons. February, 1906, Falcon No. 2, 87 78/100 tons. Falcon No. 3, 12 42/100 tons. Falcon No. 4, 26 89/100 tons. Falcon No. 5, 45 62/100 tons.

March, 1906, Falcon No. 2, 84 73/100 tons. Falcon No. 3, 10 4/100 tons. Falcon No. 4, 24 33/100 tons. Falcon No. 5, 61 38/100 tons. August, 1906, Falcon No. 2, 73 94/100 tons. Falcon No. 3, 10 42/100 tons. Falcon No. 4 did not work that month. Falcon No. 5, 66 96/100 tons. September, 1906, Falcon No. 2, 81 64/100 tons. Falcon No. 3, 13 88/100 tons. Falcon No. 4 11 23/100 tons. Falcon No. 5, 9 896/1000 tons. October, 1906, Falcon No. 2, 74 28/100 tons. No. 3, 10 99/100 tons. No. 4 23 92/100 tons. No. 5, 51 99/100 tons. November, 1906, Falcon No. 2, 79 12/100 tons. No. 3, 17 58/100 tons. No. 4, 41 97/100 tons. No. 5, 55 87/100 tons. December, 1906, Falcon No. 2, 83 51/100 tons. No. 3, 9 937/1000 tons. No. 4, 56 61/100 tons. No. 5, 73 87/100 tons. January, 1907, Falcon No. 2, 116 41/100 tons. No. 3, 14 73/100 tons. No. 4, 85 50/100 tons. No. 5, 82 6/100 tons. February, 1907, Falcon No. 2, 91 8/100 tons. No. 3, 13 20/100 tons. No. 4, 51 39/100 tons. No. 5, 61 79/100 tons. March, 1907, Falcon No. 2, 101 34/100 tons. No. 3, 18 34/100 tons. No. 4, 72 33/100 tons. No. 5, 72 17/100 tons. April, 1907, Falcon No.

2, 125 69/100 tons. No. 3, 8 77/100 tons. No. 4, 88 58/100 tons.
No. 5, 92 95/100 tons.

* * * * *

130 By Mr. LIVERIGHT:

Q. Mr. Ratew, before adjournment you said that you were making up a table for Eureka mine No. 27 showing the cars received by it in proportion to its rating. Is that completed?

A. Yes sir.

Q. Beginning with January, 1906, state what capacity of assigned cars was received by that operator?

A. 137 per cent.

Q. Was there any rating left for unassigned cars?

A. No sir.

Q. Did the mine receive any unassigned cars?

A. Yes sir.

Q. Were all the assigned cars received in excess of the capacity of the operation?

A. Yes sir.

Q. State the situation that existed in February, 1906?

A. They received 156 3/10 per cent of their rating.

Q. In assigned cars?

A. In assigned, yes sir.

Q. In addition to that did they receive unassigned cars?

A. Yes sir.

Q. How many tons?

A. 490.

Q. March, 1906?

A. The rating was 6750 tons for the month. They received 10,990 tons, which was 162 8/10 per cent of the rating.

Q. In addition to that did they receive unassigned cars?

A. Yes sir, 717 ton.

Q. Was all of that beyond the capacity of the rating of the mine?

A. Yes sir.

131 Q. August, 1906?

A. The rating was 6750 tons for the month. They received 3675 tons, which was 54 4/10 per cent of the rating.

Q. Did they get any unassigned cars?

A. No sir.

Q. September, 1906?

A. The rating was 6250 tons and they received 3990 tons or 68 6/10 per cent of their rating.

Q. What was the capacity left for unassigned cars?

A. 2260 tons. That next percentage is wrong.

Q. You made an error in the calculation for that month?

A. There is a typographical error there.

Q. How many tons did they get?

A. 280 tons.

Q. The percentage?

A. 7 2/10 per cent it ought to be.

Q. December, 1906?

A. The rating for the month was 6250 tons. They received 4515 tons or 72 $\frac{2}{10}$ per cent of their rating.

Q. Leaving what capacity for unassigned cars?

A. 1735 tons.

Q. How much did they receive?

A. 1102 tons or 63 $\frac{5}{10}$ per cent.

Q. January, 1907?

A. The rating for the month was 6500 tons. They received 2179 tons or 33 $\frac{1}{3}$ per cent of their rating, leaving a balance of 4330 tons for their capacity for unassigned cars, on which they received 2432 tons of 56 $\frac{1}{10}$ per cent.

Q. February?

A. The rating for the month was 6000 tons. They received in assigned and individual cars 1225 tons, 577 tons for fuel cars, making a total of 30 per cent of the rating for the month.

132 Q. In assigned cars?

A. Yes. In unassigned cars 4198 tons. They received 2257 tons or 53 $\frac{7}{10}$ per cent.

Q. March, 1907?

A. The rating for the month was 6500 tons. They received individual cars 5670 tons or 87 $\frac{2}{10}$ per cent, leaving the capacity for unallotted cars 830 tons, on which they received 4217 tons or 508 per cent.

Q. Five times their capacity?

A. Yes sir.

Q. April, 1907?

A. April, 1907, the rating was 6500 tons. Individual cars 5600 tons, fuel cars 35 tons, or a percentage of 68 $\frac{7}{10}$ per cent, leaving 900 tons for unassigned cars, upon which they received 612 tons or 68 per cent.

Q. Have you made up a tabulation based on the actual rating given by the Pennsylvania Railroad Company to the Falcon mines?

A. Yes sir.

Q. And showing the cars received by the Falcon mines?

A. Yes sir. Well the cars all except 2 months and those 2 months the rating was on tons and figured on tons.

Q. Do you also have on that tabulation the ratio of cars received to the rating of the mine?

A. Yes sir.

Q. Percentage I mean?

A. Yes sir.

Q. Now, as I understand it, this table you refer to is not based upon the capacity of the mine but upon the actual rating accorded it by the Pennsylvania Railroad Company?

A. Yes sir.

133 Q. What was the percentage, month by month, of each of these mines, Falcons 2, 3 and 4 during the period of the action?

A. You just want me to read the percentages?

Q. Yes?

A. Falcon No. 2 mine, October, 1905, was 22 $\frac{6}{10}$ per cent.

November 16 5/10 per cent. December 27 3/10 per cent. January, 1906, 30 6/10 per cent. February 43 7/10 per cent. March 27 6/10 per cent. September 29 3/10 per cent. October 26 9/10 per cent. November 31 4/10 per cent. December 26 per cent. January, 1907, 36 7/10 per cent. February 31 4/10 per cent. March 24 3/10 per cent. April 43 7/10 per cent. Falcon No. 3 mine, October, 1905, was 11 52/100 per cent. November 5 69/100 per cent. December 20 per cent. January, 1906, 26 9/10 per cent. February 45 8/10 per cent. March 35 18/100 per cent. August 35 19/100 per cent. September 44 per cent. October 35 18/100 per cent. November 55 76/100 per cent. December 19 per cent. January, 1907, is 19 23/100 per cent. February 21 87/100 per cent. March 32 69/100 per cent. April 16 34/100 per cent. Falcon No. 4 mine they didn't operate during October, November and December, 1905. This starting January, 1906, 34 6/10 per cent. February 43 7/10 per cent. March 43 5/10 per cent. September I didn't figure as they only worked part of the month. October, 1906, 35 2/100 per cent. November 64 4/10 per cent. December 46 5/10 per cent. January 62 per cent. February 41 1/10 per cent. March 59 6/10 per cent. April 72 6/10 per cent.

By Mr. BIKLE:

Q. Did you give anything for August?

A. August we were closed down.

Q. September?

A. September we only worked part of the month and I didn't figure it.

134 By Mr. LIVERIGHT:

Q. Did you find any month in which any one of these mines received 508 per cent of its capacity?

A. I don't see it.

Q. Is there a table being prepared now for each of these mines, showing the percentage of the cars actually received to the actual capacity of those mines?

A. Not that I know of.

Q. You don't know of that?

A. No sir.

Q. You have placed before you the percentage table of the Falcon mines. Mr. Ratew, in a letter dated March 6th, 1907, M. Trump, General Superintendent of Transportation of the Pennsylvania Railroad Company, written to Mr. J. O. Clark, set forth that the general distribution for the month of September, 1906, to mines not enjoying assigned cars was 67 9/10 per cent of their rating. Will you see what percentage for that same month was received by the Falcon mines?

A. September, 1906?

Q. Yes?

A. Falcon No. 2 received 29 3/10 per cent. Falcon No. 3, 35 18/100. We didn't figure Falcon No. 4. Isn't it 44?

Q. For that month?

A. No sir.

Q. You said 35 18/100.

A. Yes sir, 44 is correct.

Q. In the same letter Mr. Trump referred to the general distribution for December, 1906, which he stated to be 52 8/10 per cent to those operators not having the benefit of assigned cars. What was the distribution for that month to the Falcon mines?

A. Falcon No. 2 is 26 per cent. Falcon No. 3 19 per cent. Falcon No. 4 46 5/10 per cent.

Q. In the same letter Mr. Trump stated that the operators similarly situated the general distribution was for January 85 3/10 per cent. What was the distribution to the Falcon mines?

A. Falcon No. 2 was 36 7/10 per cent. Falcon No. 3, 19 23/100 per cent. Falcon No. 4, 62 per cent.

Q. In the same letter Mr. Trump stated February, 1907, the general distribution to operators of that same class was 42 6/10 per cent. What was it to the Falcon mines?

A. Falcon No. 2, 31 4/10 per cent. Falcon No. 3, 21 87/100 per cent. Falcon No. 4, 41 1/10 per cent.

* * * * *

136

PLAINTIFF'S EXHIBIT No. 29.

(Copy of Plaintiff's Exhibit No. 29.)

"Statement Showing Cars Shipped from Eureka 7, 16, 22, 27, 28 and Standard No. 7, from October 1st, 1905, to May 1st, 1907.

Cars from Clearfield.

January 1st, 1906, to May 1st, 1907.

	P. R. R.		B. W. C. M. Co.		B. G.
	Steel.	Wood.	Steel.	Wood.	
Fuel	732	541	37	338	18
	717	809	258	11102	1049
Total	1449	1350	295	11440	1067

Cars from Standard # 7.

January 1st, 1906, to May 1st, 1907.

P. R. R.		B. W. C. M. Co.		B. G.
Steel.	Wood.	Steel.	Wood.	
8	25	...	432	89

Clearfield Shipments.

Eureka.	October, 1905.		November, 1905.		December, 1905.	
	Cars shipped.	R. R. supply.	Cars shipped.	R. R. supply.	Cars shipped.	R. R. supply.
7	391	192	415	209	425	207
16	152	...	146	...	168	...
22	157	...	113	...	96	...
27	200	...	287	...	288	...
28	900	...	898	...	905	...
	1800	192	1859	200	1880	207

P. R. R.	B. W.	B. G.	P. R. R.	B. W.	B. G.	P. R. R.	B. W.	B. G.						
S. W.	S. W.		S. W.	S. W.		S. W.	S. W.							
91	89	6	1063	105	64	108	25	1133	62	63	141	17	1105	71

Cars Shipped from Standard #7.

October, 1905. November, 1905. December, 1905.

89

90

62

137

PLAINTIFF'S EXHIBIT No. 29.

Cars Shipped from Clearfield.

January, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Eureka	Fuel	75	70	...	...	...
	7	14	16	2	114	...
	16	1	10	6	111	20
	22	3	8	...	65	2
	27	6	14	7	227	17
	28	49	53	9	613	28
		<hr/>		<hr/>		<hr/>
	Fuel	75	70	...	...	...
		73	101			
		<hr/>		<hr/>		<hr/>
Total		148	171	24	1130	75
Standard	7	...	10	...	24	2

Cars Shipped from Clearfield.

February, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Eureka	Fuel	50	41	...	...	...
	7	13	35	7	121	2
	16	...	6	2	111	9
	22	...	10	1	72	7
	27	2	11	8	245	11
	28	4	45	7	656	32
		<hr/>		<hr/>		<hr/>
	Fuel	50	41	...	...	...
		19	107			
		<hr/>		<hr/>		<hr/>
Total		69	149	25	1205	61
Standard	7	...	1	...	26	2

138

PLAINTIFF'S EXHIBIT No. 29.

Cars Shipped from Clearfield.

March, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Eureka	Fuel	33	78	...	...	...
	7	2	37	6	171	4
	16	2	12	1	127	5
	22	...	6	...	77	11
	27	1	19	4	290	18
	28	12	59	14	737	38
		<hr/>		<hr/>		<hr/>
	Fuel	33	78	...	...	...
		17	133			
		<hr/>		<hr/>		<hr/>
Total		50	211	25	1402	76
Standard	7	...	1	...	40	8

Cars Shipped from Clearfield.

April, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		...	...	...	...	...
Eureka	7	...	...	...	5	...
	16	...	...	...	1	...
	22	...	...	...	...	...
	27	...	1	...	...	...
	28	...	1	...	4	...
	
Fuel		...	...	...	...	...
Total		...	2	...	10	...
Standard	7	...	...	...	1	...

139

PLAINTIFF'S EXHIBIT No. 29.

Cars Shipped from Clearfield.

May, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		...	...	...	...	...
Eureka	7	...	5	1	68	11
	16	...	...	...	12	...
	22	...	...	...	...	...
	27	...	...	...	5	...
	28	...	1	...	25	9
	
Fuel		...	...	...	...	...
		...	6	1	110	20
Standard	7	...	...	...	4	...

Cars Shipped from Clearfield.

June, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		...	...	...	...	...
Eureka	7	...	...	10	172	46
	16	1	1	...	21	...
	22	...	...	...	...	...
	27	...	...	...	8	...
	28	...	...	5	74	24
	
Fuel		...	...	...	...	...
		1	1	15	275	70
Standard	7	...	...	...	5	5

PLAINTIFF'S EXHIBIT No. 29.

Cars Shipped from Clearfield.

July, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		...	3	4	37	2
Eureka	7	1	1	15	130	38
	16	...	...	3	12	...
	22	...	2	...	13	...
	27	...	...	5	46	11
Fuel		...	...	1	1	...
	28	...	6	25	171	56
Fuel		...	3	5	38	2
		1	9	48	372	105
Total		1	12	53	410	107
Standard	7	...	...	...	5	3

Cars Shipped from Clearfield.

August, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		3	2	...	...	...
Eureka	7	...	...	40	124	16
	16	...	...	...	33	6
	22	...	3	3	73	4
	27	...	...	16	68	13
Fuel		23	3	18	60	4
	28	2	...	41	174	23
Fuel		26	5	18	60	4
		2	3	100	472	62
Total		28	8	118	532	66
Standard	7	...	...	...	12	1

PLAINTIFF'S EXHIBIT No. 29.

Cars Shipped from Clearfield.

September, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		...	...	...	...	...
Eureka	7	...	16	1	141	7
	16	...	...	1	37	3
	22	1	2	...	56	7
	27	...	8	...	104	10
Fuel		12	34	13	64	5
	28	8	13	10	327	30
Fuel		12	34	13	64	5
		4	39	12	665	57
Total		16	73	25	729	62
Standard	7	...	4	...	30	2

Cars Shipped from Clearfield.

October, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Eureka	7	...	1	1	233	20
	16	...	1	...	75	3
	22	...	...	...	80	7
	27	...	...	...	145	4
Fuel		16	22	1	119	5
	28	4	2	1	403	22
Fuel		16	22	1	119	5
		4	4	2	936	56
Total		20	26	3	1055	61
Standard	7	...	...	...	71	5

142

PLAINTIFF'S EXHIBIT No. 29.

Cars Shipped from Clearfield.

November, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Eureka	7	...	...	2	305	21
	16	...	...	...	71	12
	22	...	...	...	71	8
	27	...	...	1	189	9
Fuel		56	33	...	57	2
	28	18	9	...	483	37
Fuel		56	33	...	57	2
		18	9	3	1119	87
		74	42	3	1176	89
Standard	7	...	...	...	64	18

Cars Shipped from Clearfield.

December, 1906.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		6	...	...	...	...
Eureka	7	19	5	...	196	7
	16	...	...	1	64	8
	22	...	3	...	64	3
	27	15	9	...	123	6
Fuel		74	95	...	...	...
	28	19	10	...	434	25
Fuel		80	95	...	...	...
		53	27	...	...	...
Total		133	122	1	881	49
Standard	7	...	...	...	47	17

PLAINTIFF'S EXHIBIT No. 29.

Cars Shipped from Clearfield.

January, 1907.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		12	1	...	...	...
Eureka	7	06	32	1	113	15
	16	11	1	...	43	1
	22	11	5	...	43	7
	27	39	11	...	60	2
Fuel		71	58	...	...	...
	28	73	50	...	292	30
		<hr/>		<hr/>		<hr/>
Fuel		83	57	...	...	...
		200	99			
		<hr/>		<hr/>		<hr/>
Total		283	156	1	551	53
Standard	7	2	...	...	48	16

Cars Shipped from Clearfield.

February, 1907.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		15	3	...	...	...
Eureka	7	25	17	1	98	14
	16	4	7	...	41	24
	22	4	13	...	33	11
Fuel		11	...	...	...	...
	27	39	6	...	16	19
Fuel		63	24	...	...	...
	28	87	58	...	78	45
		<hr/>		<hr/>		<hr/>
Fuel		89	27	...	...	...
		159	101			
		<hr/>		<hr/>		<hr/>
Total		248	128	1	266	113
Standard	7	3	8	...	25	11

PLAINTIFF'S EXHIBIT No. 29.

Cars Shipped from Clearfield.

March, 1907.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel		15	1	...	...	...
Eureka	7	15	32	...	216	32
	16	3	1	...	68	26
	22	1	4	...	50	11
	27	13	6	...	150	12
Fuel		96	36	...	...	...
	28	51	44	...	331	23
		<hr/>		<hr/>		<hr/>
Fuel		111	37	...	...	...
		83	87			
		<hr/>		<hr/>		<hr/>
Total		194	124	...	815	104
Standard	7	...	...	...	22	8

Cars Shipped from Clearfield.

April, 1907.

		P. R. R.		B. W. C. M. Co.		B. G.
		Steel.	Wood.	Steel.	Wood.	
Fuel	7	3	2	...	...	...
	16	7	11	...	226	10
	22	...	...	...	83	11
Fuel	27	...	7	...	51	5
	27	...	1	...	...	...
	27	11	1	...	146	14
Fuel	28	98	36	...	...	...
	28	65	62	...	387	19
	
Fuel		101	39	...	...	...
		83	81	...	...	...
	
Total		184	120	...	893	59
Standard	7	...	1	...	8	1"

145

PLAINTIFF'S EXHIBIT No. 31.

(Copy of Plaintiff's Exhibit No. 31.)

Eureka Mines # 7, # 16, # 22, # 27, # 28.

Month & year.	Total rating, 2100 tons per day.	Assigned cars.		Per cent of cap. of assigned cars.	Cap. allot. to unassigned cars.	Unassigned cars.	Per cent of cap. of unassigned cars.
		Ind. in tons.	Fuel in tons.				
26d. Oct. '05...	54,600	45,000	4,800	91.2	4,800	....	....
26d. Nov. '05...	54,600	46,475	5,225	94.7	2,900	....	....
25d. Dec. '05...	52,500	47,000	5,175	99.3	325	....	....
26d. Jan. '06...	54,600	43,435	6,387	91.2	4,778	7,368	154.2
24d. Feb. '06...	50,400	45,622	4,060	98.5	718	4,742	660.4
27d. Mar. '06...	56,700	47,042	4,462	90.8	4,196	5,547	132.2
27d. Aug. '06...	56,700	27,125	1,540	50.5	28,035	210	.7
25d. Sep. '06...	52,500	28,997	1,820	58.7	21,683	1,575	7.2
27d. Oct. '06...	56,700	39,217	1,610	72.0	15,873	350	2.2
26d. Nov. '06...	54,600	44,432	4,095	88.9	6,073	1,260	20.7
25d. Dec. '06...	52,500	32,602	7,525	76.4	12,373	3,727	30.1
26d. Jan. '07...	54,600	21,262	6,352	50.6	26,986	13,965	51.7
24d. Feb. '07...	50,400	13,317	5,617	37.5	31,406	11,882	37.7
26d. Mar. '07...	54,600	32,165	7,122	71.9	15,313	7,402	48.3
26d. Apr. '07...	54,600	33,320	6,667	73.2	14,613	7,192	49.2

Eureka Mine No. 7.

400 Ton- per Day.

26d. Oct. '05...	10,400	9,775	4,800	140.1	....	....	....
26d. Nov. '05...	10,400	10,375	5,225	150.0	....	....	....
25d. Dec. '05...	10,000	10,625	5,175	157.7	....	....	....
26d. Jan. '06...	10,400	4,795	6,387	107.5	....	1,295	all over
24d. Feb. '06...	9,600	4,672	4,060	90.9	868	1,907	219.7
27d. Mar. '06...	10,800	6,405	4,462	100.6	....	1,400	all over
27d. Aug. '06...	10,800	7,000	227	66.9	3,573	....	....
25d. Sep. '06...	10,000	5,233	....	52.3	4,767	500	11.7
27d. Oct. '06...	10,800	8,907	....	82.5	1,893	35	1.9
26d. Nov. '06...	10,400	11,515	....	110.7	....	....	....
25d. Dec. '06...	10,000	8,155	315	84.7	1,530	1,172	76.6
26d. Jan. '07...	10,400	4,532	665	49.9	5,203	4,585	88.
24d. Feb. '07...	9,600	3,672	892	50.6	4,736	1,907	40.2
26d. Mar. '07...	10,400	8,680	822	91.3	898	1,907	212.3
26d. Apr. '07...	10,400	8,260	227	81.5	1,913	752	39.3

146

PLAINTIFF'S EXHIBIT No. 32.

(Copy of Plaintiff's Exhibit No. 32.)

Eureka Mine No. 28.

	Rating, 100 tons per day.	Assigned cars.		Per cent of cap. of assigned cars.	Cap. allot. to unassigned cars.	Unassigned cars.	Per cent of cap. of unassigned cars.
		Ind. in tons.	Fuel in tons.				
26d. Oct. '05...	26,000	22,500	....	86.5	3,500	....	....
26d. Nov. '05...	26,000	22,450	....	86.3	3,550	....	....
25d. Dec. '05...	25,000	22,625	....	90.5	2,375	....	....
26d. Jan. '06...	26,000	22,820	....	87.8	3,180	4,427	139.2
24d. Feb. '06...	24,000	24,447	....	101.8	....	1,785	all over
27d. Mar. '06...	27,000	27,800	....	103.2	....	2,695	do.
27d. Aug. '06...	27,000	27,125	1,312	105.3	....	105	do.
25d. Sep. '06...	25,000	16,117	1,820	71.7	7,063	612	8.6
27d. Oct. '06...	27,000	19,320	1,610	77.8	6,070	280	4.6
26d. Nov. '06...	26,000	20,265	4,095	93.7	1,640	1,260	76.8
25d. Dec. '06...	25,000	16,065	7,210	93.1	1,725	1,347	78.1
26d. Jan. '07...	26,000	11,270	5,687	65.2	9,043	5,582	61.7
24d. Feb. '07...	24,000	4,305	4,130	35.1	15,595	6,597	42.3
26d. Mar. '07...	26,000	12,300	6,300	71.8	7,310	4,217	57.7
26d. Apr. '07...	26,000	14,210	6,405	79.3	5,385	5,932	110.1

147

PLAINTIFF'S EXHIBIT No. 33.

(Copy of Plaintiff's Exhibit No. 33.)

Eureka Mine No. 27.

Month & year.	Rating, 25 tons per day.	Assigned cars.		Per cent of cap. of assigned cars.	Cap. allot. to unassigned cars.	Unassigned cars.	Per cent of cap. of unassigned cars.
		Ind. cars.	Fuel cars.				
26d. Oct. '05...	6,500	5,000	....	76.9	1,500	....	....
26d. Nov. '05...	6,500	7,175	....	110.3	....	....	....
25d. Dec. '05...	6,250	7,200	....	113.6	....	....	....
26d. Jan. '06...	6,500	8,907	....	137.0	....	805	all over
24d. Feb. '06...	6,000	9,380	....	156.3	....	490	do.
27d. Mar. '06...	6,750	10,990	....	162.8	....	717	do.
27d. Aug. '06...	6,750	3,675	....	54.4	3,075	....	....
25d. Sep. '06...	6,250	3,990	....	68.8	2,260	280	12.3
27d. Oct. '06...	6,750	5,215	....	77.2	1,535	....	....
26d. Nov. '06...	6,500	6,983	....	107.4	....	....	....
25d. Dec. '06...	6,250	4,515	....	72.2	1,735	1,102	63.5
26d. Jan. '07...	6,500	2,170	....	33.3	4,330	2,432	56.1
24d. Feb. '07...	6,000	1,225	577	30.0	4,198	2,257	53.7
26d. Mar. '07...	6,500	5,670	....	87.2	830	4,217	508.0
26d. Apr. '07...	6,500	5,600	35	86.7	900	612	68.0

148 JACOB H. MILLER recalled on part of Plaintiff.

By Mr. LIVERIGHT:

Q. Have you made up a percentage table showing the percentage of cars received at the Falcon mines, based on the output capacity of the mines to which you have heretofore testified to in the case?

A. I have.

Q. Have you reduced the output capacity to cars?

A. I have.

Q. At how many cars is that stated for No. 2 mine?

A. 17 cars.

Q. A day?

A. Yes sir.

Q. And for No. 3?

A. 3 cars.

Q. No. 4?

A. 8 cars.

Q. Have you then multiplied the per diem output by the number of days in the month?

A. Number of working days, yes sir.

Q. And then have you divided the number of cars received per month by the number of cars that should have been received?

A. I have.

Q. According to your calculation what is the percentage of cars delivered by the Railroad Company to these mines on that basis month by month?

A. Falcon No. 2, October 14th to 31st, 1905, 16 8/10. For November 12 4/10. December 13 6/10. January 16 1/10. February 23 1/10. March 14 6/10. August 14 6/10. September 15 5/10. October 14 2/10. November 16 6/10. December 15 3/10. January 21 6/10. February 18 5/10. March 20 3/10. April 25 7/10. Falcon No. 3 14 days in October 11 9/10. November 5 1/10. December 6 6/10. January 8 9/10. February 15 2/10. March 11 7/10. August 11 7/10. September 14 6/10. October 11 7/10. November 18 8/10. December 12 6/10. January 12 8/10. February 14 5/10. March 21 8/10. April 10 9/10. Falcon No. 4, for January, 1906, 4 9/10. February 10 9/10. March 10 8/10. August, no work in August. September only worked part of it, we did not calculate that. October 8 7/10. November 16 1/10. December 23 2/10. January 31, February 20 5/10. March 29 8/10. April 36 3/10.

Mr. GOWEN: No cross examination.

149

PLAINTIFF'S EXHIBIT No. 38.

(Copy of Plaintiff's Exhibit No. 38.)

"Clark Brothers Coal Mining Company.

Falcon Mines.

No. 2.	Capacity rating, tons or cars.		Foreign & assigned cars.	Rating for unassigned —	Cars rec'd.	Per cent of capacity of unassigned cars.
	Per day.	Total.				
14d. Oct. '05.....	450	6,300	.....	6,300	1,428.62	22.6
26d. Nov. '05.....	450	11,700	.....	11,700	1,932.76	16.5
25d. Dec. '05.....	9	225	10 s.	205	56	27.3
26d. Jan. '06.....	9	234	.....	234	71.5	30.6
24d. Feb. '06.....	9	216	.....	216	94.5	43.7
27d. Mar. '06.....	9	243	.....	243	67	27.6
27d. Aug. '06.....	9	243	.....	243	67	27.6
25d. Sep. '06.....	9	225	.....	225	66	29.3
27d. Oct. '06.....	9	243	.....	243	65.5	26.9
26d. Nov. '06.....	9	234	.....	234	73.5	31.4
25d. Dec. '06.....	10	250	.....	250	65	26.0
26d. Jan. '07.....	10	260	.....	260	95.5	36.7
24d. Feb. '07.....	10	240	.....	240	75.5	31.4
26d. Mar. '07.....	10	260	.....	260	89.	34.2
26d. Apr. '07.....	10	260	.....	260	113.5	43.7
No. 3.						
14d. Oct. '05.....	100	1,400	.....	1,400	161.34	11.52
26d. Nov. '05.....	100	2,600	.....	2,600	148.05	5.69
25d. Dec. '05.....	1	25	.....	25	5	20.0
26d. Jan. '06.....	1	26	.....	26	7	26.9
24d. Feb. '06.....	1	24	.....	24	11	45.8
27d. Mar. '06.....	1	27	.....	27	9.5	35.18
27d. Aug. '06.....	1	27	.....	27	9.5	35.18
25d. Sep. '06.....	1	25	.....	25	11	44.
27d. Oct. '06.....	1	27	.....	27	9.5	35.18
26d. Nov. '06.....	1	26	.....	26	14.5	55.76
25d. Dec. '06.....	2	50	.....	50	9.5	19.
26d. Jan. '07.....	2	52	.....	52	10	19.23
24d. Feb. '07.....	2	48	.....	48	10.5	21.87
26d. Mar. '07.....	2	52	.....	52	17	32.69
26d. Apr. '07.....	2	52	.....	52	8.5	16.34
No. 4.						
26d. Jan. '06.....	2	52	26	26	9	34.6
24d. Feb. '06.....	2	48	.....	48	21	43.7
27d. Mar. '06.....	2	54	.....	54	23.5	43.5
27d. Aug. '06.....			closed down			
25d. Sep. '06.....			worked only part of month			
27d. Oct. '06.....	2	54	.....	54	19	35.2
26d. Nov. '06.....	2	52	.....	52	33.5	64.4
25d. Dec. '06.....	4	100	.....	100	46.5	46.5
26d. Jan. '07.....	4	104	.....	104	64.5	62.
24d. Feb. '07.....	4	96	.....	96	39.5	41.1
26d. Mar. '07.....	4	104	.....	104	62	59.6
26d. Apr. '07.....	4	104	.....	104	75.5	72.6"

150

PLAINTIFF'S EXHIBIT No. 39.

(Copy of Plaintiff's Exhibit No. 39.)

"Clark Brothers Coal Mining Company.

Falcon Mines.

		Capacity rating in cars.	Foreign assigned cars.	Rating for unassigned cars.	Cars received.	Per cent of capacity of unassigned cars.
No. 2.						
14d. Oct.	'05.....	17	.....	238	40	16.8
26d. Nov.	'05.....	17	.....	442	55	12.4
25d. Dec.	'05.....	17	10 s.	410	56	13.6
26d. Jan.	'06.....	17	.....	442	71.5	16.1
24d. Feb.	'06.....	17	.....	408	94.5	23.1
27d. Mar.	'06.....	17	.....	459	67	14.6
27d. Aug.	'06.....	17	.....	459	67	14.6
25d. Sep.	'06.....	17	.....	425	66	15.5
27d. Oct.	'06.....	17	.....	459	65.5	14.2
26d. Nov.	'06.....	17	.....	442	73.5	16.6
25d. Dec.	'06.....	17	.....	425	65	15.3
26d. Jan.	'07.....	17	.....	442	95.5	21.6
24d. Feb.	'07.....	17	.....	408	75.5	18.5
26d. Mar.	'07.....	17	.....	442	89	20.3
26d. Apr.	'07.....	17	.....	442	113.5	25.7
No. 3.						
14d. Oct.	'05.....	3	.....	42	5	11.9
26d. Nov.	'05.....	3	.....	78	4	5.1
25d. Dec.	'05.....	3	.....	75	5	6.6
26d. Jan.	'06.....	3	.....	78	7	8.9
24d. Feb.	'06.....	3	.....	72	11	15.2
27d. Mar.	'06.....	3	.....	81	9.5	11.7
27d. Aug.	'06.....	3	.....	81	9.5	11.7
25d. Sep.	'06.....	3	.....	75	11	14.6
27d. Oct.	'06.....	3	.....	81	9.5	11.7
26d. Nov.	'06.....	3	.....	78	14.5	18.8
25d. Dec.	'06.....	3	.....	75	9.5	12.6
26d. Jan.	'07.....	3	.....	78	10	12.8
24d. Feb.	'07.....	3	.....	72	10.5	14.5
26d. Mar.	'07.....	3	.....	78	17	21.8
26d. Apr.	'07.....	3	.....	78	8.5	10.9
No. 4.						
26d. Jan.	'06.....	8	26	182	9	4.9
24d. Feb.	'06.....	8	.....	192	21	10.9
27d. Mar.	'06.....	8	.....	216	23.5	10.8
27d. Aug.	'06.....					
25d. Sep.	'06.....					
27d. Oct.	'06.....	8	closed down	216	19	8.7
26d. Nov.	'06.....	8	worked only part of	208	33.5	16.1
25d. Dec.	'06.....	8	month	200	46.5	23.2
26d. Jan.	'07.....	8	.....	208	64.5	31
24d. Feb.	'07.....	8	.....	192	39.5	20.5
26d. Mar.	'07.....	8	.....	208	62	29.8
26d. Apr.	'07.....	8	.....	208	75.5	36.3"

151

PLAINTIFF'S EXHIBIT No. 40.

(Copy of Plaintiff's Exhibit No. 40.)

David E. Williams & Company.

(Glenwood Coal Co.)

No. 48 cars. No. 95 "	Capacity rating, 13 cars per day.	Foreign and assigned cars.	Rating for unassigned cars.	Cars received.	Per cent of capacity of unassigned cars.
26d. Oct. 1905.....	338	20.5	317.5	158	49.7
26d. Nov. 1905.....	338	62.5	275.5	122.5	44.4
25d. Dec. ".....	325	84.5	240.5	98.5	40.0
26d. Jan. 1906.....	338	126.5	211.5	78.5	37.1
24d. Feb. ".....	312	29.5	282.5	163	57.7
27d. Mar. ".....	351	53.5	297.5	191	64.5
27d. Aug. ".....	351	54	297	115	38.7
25d. Sep. ".....	325	22	303	155.5	51.3
27d. Oct. ".....	351	1.5	349.5	186	53.2
26d. Nov. ".....	338	.....	338	155.5	48.9
25d. Dec. ".....	325	122.5	202.5	120	59.5
26d. Jan. 1907.....	338	113.5	224.5	224.5	100.00
24d. Feb. ".....	312	152	160	65.5	40.9
26d. Mar. ".....	338	155	183	113	61.7
26d. Apr. ".....	338	91.5	246.5	180	73.0"

152

PLAINTIFF'S EXHIBIT No. 41.

(Copy of Plaintiff's Exhibit No. 41.)

"Clark Brothers Coal Mining Company.

Falcon No. 5.

	Capacity rating.		Foreign & assigned cars.	Rating for unassigned cars in tons.	Cars rec'd in tons.	Per cent of cap. of un- assigned cars in tons.
	Tons per day.	Tons per month.				
26d. Oct. '05....	...	....	.....	....	....	.....
26d. Nov. '05....	...	....	.....	....	....	.....
25d. Dec. '05....	...	....	.....	....	....	.....
26d. Jan. '06....	100	2,600	.....	2,600	70.80	.....
24d. Feb. '06....	150	3,600	.....	3,600	1,094.86	30.4
27d. Mar. '06....	200	5,400	.....	5,400	1,657.32	30.7
27d. Aug. '06....	250	6,750	.....	6,750	1,808.47	26.7
25d. Sep. '06....	300	7,500	.....	7,500	247.41	3.3
27d. Oct. '06....	300	8,100	.....	8,100	1,403.94	17.3
26d. Nov. '06....	300	7,800	.....	7,800	1,396.83	17.9
25d. Dec. '06....	300	7,500	.....	7,500	1,846.96	24.6
26d. Jan. '07....	300	7,800	.....	7,800	2,133.70	27.3
24d. Feb. '07....	300	7,200	.....	7,200	1,483.08	20.6
26d. Mar. '07....	300	7,800	.....	7,800	1,948.66	25.0
26d. Apr. '07....	300	7,800	.....	7,800	2,416.87	31.0"

153

DEFENDANT'S EXHIBIT No. 7.

* * * * *

The complainant alleges that the system under which the defendant distributed its coal cars was unlawful and discriminatory, in that certain classes of cars were furnished to mines in competition with it and not counted against the distributive quota of those mines, which resulted in the giving of more cars to its competitor than it was justly entitled to have. The allegation is not that the defendant made the complainant the object of any special act of discrimination. It did not unfairly apply its system of distribution in determining the number of cars to which the complainant was entitled, nor did it fail to deliver at the complainant's mine, the cars to which it was entitled under the scheme in force; but it applied a system or practice which in its working out was unjust and discriminatory to the complainant.

The Commission finds that the method of distribution in force as to all shippers upon the lines of the defendant during the period covered by this complaint was unlawful and discriminatory and has directed the establishment of a different system for the future; but it declines to consider to what extent the complainant has been injured by the application of this practice, and to ascertain and award the damages which, confessedly, must have accrued.

* * * * *

154 M. TRUMP called on part of Defendant, being duly sworn and examined, testified as follows:

* * * * *

Cross-examination:

* * * * *

Mr. LIVERIGHT: We don't care what led up to the rule.

Q. Now this rule of January, 1906, says, that assigned cars and foreign railroad cars specially consigned for fuel supply and individual cars assigned by the owners thereof would be charged against the capacity of the mines, and the difference between the rated capacity of the mine and the capacity of the assigned cars would be the rated capacity on which all other cars would be pro rated?

A. Yes sir, that fixes the Standard 7 business from 1906.

Q. That terminates that feature?

A. Yes.

155 Q. Isn't it a fact that when the Berwind mines had assigned cars up to or beyond their capacity, they had no rating left to apply against unassigned cars?

A. I don't know that condition existed.

Q. But it has been proven here it existed and if the testimony is correct, isn't my proposition true?

A. I don't think that testimony is correct.

Q. I am not going to argue that point with you, but it is in the

evidence here and I say basing the question upon that testimony, isn't it true that Berwinds had no rating left for unassigned cars?

A. I say that testimony is worked out on the wrong basis.

Q. Answer my question please?

A. Repeat the question.

Q. Isn't it correct, if the testimony here given from the witness stand is true, that in periods when Berwinds had assigned cars up to their rated capacity they had no rating left for unassigned cars?

A. If the testimony is true, that is correct, yes sir.

Q. And in those instances when Berwinds received unassigned cars they were getting them in violation of the rule, weren't they?

A. If the testimony is correct, yes sir.

Q. And when they got unassigned cars, having a small rating left therefor, to the amount of 508 per cent of their rating for them and at the same time the Clark Brothers mines got assigned cars to 36 7/10 per cent of their capacity, to 19 23/100 per cent of their rated capacity, and to 62 per cent of their rated capacity, respectively, this rule promulgated by you is violated?

A. If that testimony is worked out right.

Q. If that testimony given in this case is correct, the Pennsylvania Railroad Company was violating its own rules, wasn't it?

A. Our rules call——

156 Q. Answer the question?

A. No sir.

Q. The cars were being distributed in violation of the rules?

A. The statement is not worked up——

Q. Answer the question?

A. I am not going to have anything chucked down my throat that is not correct.

Q. I am not chucking anything down your throat. Isn't it a fact if the testimony here is true, showing that in percentage periods Berwinds got 508 per cent of their rating for unassigned cars and at the same time Clark Brothers Coal Mining Company got cars up to 20 to 40 or 50 per cent of their capacity or their rated capacity for unassigned cars, your rules were being violated?

A. I said yes, provided that statement is worked up properly.

Q. Now you don't want to take it back, do you?

A. No sir.

* * * * *

157 GEORGE W. CREIGHTON called on part of defendant, being duly sworn and examined, testified as follows:

* * * * *

Cross-examination:

* * * * *

Q. Now the times that is covered by this action were ordinary times in the business?

A. It was ordinary times, but you are covering a very long period. It is impossible for a person to state definitely whether the cars were over, rather whether we had a surplus at this particular period,

because I feel quite confident we may not have had a surplus of cars throughout the entire period. There may have been sometimes during this period we did have a surplus of cars. Now, if when that occurred, if you took the record of the cars delivered to this particular operation under discussion, we could then probably get a proper explanation. In other words, with a surplus of cars on the railroad you would find these people got all the cars they wanted at that time and when they were short of cars we didn't have a surplus.

Q. They say they were short for 15 months covered by this action all the time and you say those were ordinary times when you had cars to supply the market?

158 A. Yes, I am telling you it was a very ordinary condition of affairs, but if you want to get down to detail and particulars you have got to compare the conditions by the sheets. No man can recollect in detail just exactly whether the days these operations were short that we had cars standing over some other place.

Q. You have heard the testimony here for three or four days of this case and heard the complaints of the Clark Brothers, haven't you?

A. Yes sir.

Q. And you have had in your possession during all of that time these your distribution sheets, haven't you?

A. Yes sir.

Q. Have you undertaken to inform yourself as to any excuse for this?

A. I didn't inform myself because I didn't think there was any particular point involved in it. We were endeavoring to do our duty by these people and I assume we did do it.

Q. Did this testimony satisfy you you had done it?

A. It didn't satisfy me we hadn't.

Q. Then you think 83 days out of 8 months is not an unreasonable time for those operators to be idle, do you, when they say they were clamoring for cars?

A. I didn't agree with the line of evidence given that the reason assigned was the only reason for that condition of affairs.

Q. Assuming they told the truth, we assume ordinarily that witnesses tell the truth unless there is something to indicate different; are you now, after listening to it for four days, are you prepared to give any excuse for it at all?

A. I wouldn't like to express an opinion about that, Mr. Cole. The question about car supply is rather a complicated one and you can't express opinions without knowing all the facts connected with the distribution.

159 Q. That is what you are superintendent for is to know these facts?

A. Yes, but I don't know all the detail of my business. I couldn't carry it.

Q. You have got the records to tell you, haven't you?

A. Yes, and I have got the employees to tell me too.

Q. Have you ever asked them why it was there was 83 days shortage up there for Clarks mine?

A. No sir, I did not.

* * * * *

160 Q. Did you follow the percentage distribution?

A. Yes.

Q. Now you heard the testimony here that in one particular month Berwinds had 500 per cent of their rated distribution of unassigned cars and that Clarks had at one of their mines in the immediate vicinity as low as 10 per cent. How can you explain that?

A. I can't explain those figures. I don't know that they were made up from my figures or somebody else's figures and I wouldn't like to assume anybody else's record. If I was asked to explain it, I would have to go to our own record.

Q. Assuming that these witnesses tell the truth, as I say we assume it here, is there any explanation for that kind of position?

A. I don't want to explain any other witnesses' evidence.

Q. This isn't explaining any other witnesses' evidence, it is explaining your conduct we are asking for?

A. You are asking more or less hypothetical questions.

Q. I ask a question based on facts. If Berwinds got 500 per cent of their distribution and these people got 10, how can there be any possible excuse for that?

A. I don't believe it is so.

Q. I asked you to assume it was so?

A. I say it was wrong then.

Q. It was wrong?

A. Yes. As I explained to you a while ago, it was our assumption we were doing right in our distribution and the only evidence whether we were doing right is we can produce our sheets.

161 By Mr. GOWEN:

Q. During the period covered by this action did the Pennsylvania Railroad have cars to enable it to give all its shippers cars equal to the physical capacity of the mine?

A. No sir, not covering any extended period is that at all possible.

Q. Did they have cars sufficient to enable them to give to all shippers cars equal to the rated capacity of their mines?

A. Rated capacity?

Q. The rating of their mines?

A. There may have been some times they would have been able to give them 100 per cent, but as a rule not.

By Mr. COLE:

Q. Then why would you give Berwind-White from 100 to 500 per cent above their rated capacity, if you couldn't give the others their rated capacity?

A. I can't explain it without reference, as I said before, to the sheets, and covering the period of time mentioned.

Q. You can't explain it without referring to something you have in your possession you haven't referred to?

A. It would be the wildest sort of guess for me to endeavor to answer some of the questions you put.

Q. According to the testimony of Mr. Chase as to the amount of cars they actually shipped, and they must have gotten from the Pennsylvania Railroad, here is one month they got 660 4/10 per cent of the unassigned cars.

* * * * *

162 M. TRUMP recalled on part of defendant.

* * * * *

Q. You knew that Clarks were complaining during the whole period of this action because they didn't get cars enough, didn't you?

A. Yes sir.

Q. That was frequently brought to your attention, wasn't it?

A. Yes sir.

Q. Now you say, you won't say the reason they didn't get cars was because you had a car shortage?

A. I can't say that in the abstract, no sir.

* * * * *

163 G. E. OLER recalled for the cross-examination.

* * * * *

By Mr. LIVERIGHT:

Q. These ratings were not made up on the basis of the mine capacity at all, were they, these daily distribution ratings?

A. It was based on—

Q. Tonnage ordered, wasn't it?

A. The order.

Q. The tonnage ordered was the basis, wasn't it?

A. No sir.

Q. Are you sure of that?

A. I am sure of that up until June 17, 1906. Then we went on an order basis.

Q. That is to say, beginning June 17, 1906, you put down the number of cars ordered by each mine, didn't you?

A. Not exceeding his rated capacity.

Q. And if he didn't order up to his rated capacity, he was credited only with the amount of his order?

A. After June 17, 1906, yes sir.

Q. That was an unvarying policy?

A. Yes sir.

Q. Do you know anything about the orders placed by the Berwind mines for their cars?

A. I do not.

Q. Do you know whether they got cars that weren't ordered?

A. I could say they didn't according to the distribution sheets.

Q. You are sure that none of these mines, Eureka 7, 16, 22, 27 or 28, on the distribution sheets shows any cars delivered to that particular mine not ordered by the mine?

A. Are you referring to the whole period as a whole?

Q. I am referring to the whole period, yes sir?

A. Then I would say from experience that they probably got cars that same day they hadn't been shown as an order.

Q. Didn't that occur over a large number of days?

164 A. No, I wouldn't say that. I couldn't say that until I referred to the distribution sheets.

Q. Don't you know that in the month of January, 1907, it occurred as many as 20 days?

A. Yes sir, I have an explanation for that.

Q. I supposed you had. Let us have it?

A. In the month of January, 1907 the Pennsylvania Railroad Company had more cars than they could dispose of and they were putting them in any mine siding that could accommodate them, and that is the explanation for Berwinds or any other company getting more cars than ordered.

Q. How does it explain the Falcon mines didn't receive as many cars as they ordered that month?

A. I am referring to a part of the month, up until about the 13th of January, 1907.

Q. The 13th?

A. I think that is the January you referred to, 1907.

Q. Yes sir?

A. They probably received cars and didn't order them.

Q. Who?

A. Berwinds and everybody else, because as I explained.

Q. You don't say that was so as far as the Falcon mines is concerned?

A. I say if the Falcon mines siding were empty, they could have taken all the cars they wanted up until about the 13th.

Q. Got your sheets for January, 1907, the Tyrone Division. Refer to January 13th. I won't ask you to refer to that. I presume you referred to the order from Mr. Creighton and Mr. Johnson about the 8th of January, 1907, that cars were flowing freely and to distribute them regardless of the percentages, don't you?

A. Well I just don't know of the existence of such an order, but I presume that is.

165 Q. Look at your sheet and see if there isn't one attached to that effect?

A. January 13th, I suppose there is.

Q. January 8th I think it is?

A. January 8th?

Q. I think there is a mistake about that. It is January 1906. What does that order say?

A. That says just about what I explained, on account of having a surplus of coal cars and no place to put them they could disregard all ratings and place the cars where the mine siding would accommodate them.

Q. What is the date of that?

A. I presume it is struck twice on the typewriter, but it is January 8th 1906.

Q. Isn't that abrogated on January 11th, 1906?

A. According to the notation on the bottom, it is.

Q. Get your sheets for January 16th. How many system cars for commercial shipments were ordered that day by Eureka No. 7 mine?

A. Eureka No. 7 for commercial ordered none.

Q. How many did they get?

A. They received one hopper and one steel, but just let me explain.

Q. $2\frac{1}{2}$ cars.

A. $2\frac{1}{2}$ cars.

Q. You can do your explaining after while?

A. There is an explanation to that.

Q. I am asking what the sheets show?

A. The sheets show they got one hopper and one steel.

Q. Now get the 16th and see what they show. We are now asking for interpretations by this young man.

A. They received two hoppers and two steels. No order.

Q. The 23rd?

A. Received 3 steels.

166 That is $4\frac{1}{2}$ cars?

A. Yes sir.

Q. No orders?

A. No order.

Q. The 27th?

A. Received 3 hoppers and one steel.

Q. How many did they order?

A. Didn't order any. Eureka No. 7 isn't shown as ordering any.

Q. Eureka No. 7 on the 31st?

A. Received 4 steels. Not shown as ordering any.

Q. Eureka No. 27 received how many that day?

A. Eureka No. 27 received 6 steel.

Q. 9 cars on a wooden basis?

A. Total 9 cars.

Q. How many did it order?

A. Eureka 27 ordered 20 hoppers.

Q. For commercial shipments?

A. Yes sir.

Q. Are you sure of that?

A. Yes sir, Eureka 27 ordered 20 hoppers commercial shipments.

Q. Eureka 28 ordered how many?

A. Didn't order any.

Q. How many did it get ?

A. 5 hoppers, 7 steels.

Q. Or a total of $15\frac{1}{2}$ cars?

A. Yes sir.

Q. That it didn't order?

A. Didn't order. That is, that Eureka 28 isn't shown as ordering.

Q. They got $15\frac{1}{2}$?

A. Yes sir.

Q. These sheets are supposed to show everything ordered?

167 A. If you allow me to make an explanation, I will satisfy you.

Q. You will satisfy yourself but won't satisfy anybody else.

Don't you know this practice went on persistently throughout the entire period of this action?

Mr. BIKLE: What practice?

Mr. LIVERIGHT: The practice of distributing cars to Eureka 7, 16, 22, 27 and 28 which were not ordered?

A. No sir, not after I think it was along about we will say the latter part of January, 1906.

Q. That was the end of it?

A. About the end of it. There may have been stray days.

Q. A stray day in February, 1906?

A. There may be, I am not saying about that.

Q. You are satisfied that was the end of this pernicious practice?

A. Yes sir.

Q. Get December 13th, 1906. How many did Eureka No. 28 order that day?

A. Eureka 28?

Q. Commercial shipments?

A. Commercial shipments, didn't order any.

Q. How many did it get?

A. One hopper and two steel, or total of four.

Q. Get January, 1907, sheets now?

A. I have it.

Q. At that time, as I understand it, cars were distributed on the basis of ratings and when the mine had ordered up to its rating in assigned cars, it had no rating for unassigned cars. Is that correct?

A. That is correct.

Q. If it had no rating for unassigned cars, in your general scheme of distribution it wasn't entitled to any?

A. It wouldn't participate in the distributions.

168 Q. Get January, 1907, the first day, Eureka No. 7 was entitled to how many unassigned cars?

A. Wasn't entitled to any.

Q. Did it get any?

A. Yes sir.

Q. How many?

A. It got 4 hoppers and 3 steels, total $8\frac{1}{2}$.

Q. And wasn't entitled to any?

A. Wasn't entitled to any.

Q. January 2nd, will you get. Eureka 7 was entitled to how many unassigned cars?

A. None. Received 4 hoppers and 3 steels, total of $8\frac{1}{2}$. Those are probably cars standing over from the day before.

Q. That is just your guess, isn't it?

A. I think it is a pretty accurate guess.

Q. You are a pretty good little guesser, aren't you?

Mr. BIKLE: Tell Mr. Liveright what day of the year January 1st was.

By Mr. LIVERIGHT:

Q. These are cars ordered and received and are not cars standing over at all. Eureka No. 27 was entitled to how many?

A. Eureka 27 entitled to 3.

Q. How many did it get?

A. It got a total of $7\frac{1}{2}$, $4\frac{1}{2}$ cars excess.

Q. No. 28 entitled to how many?

A. No. 28 entitled to none and received one hopper. Excess one.

Q. Get your sheet for the 7th. How many was Eureka No. 7 entitled to?

A. Entitled to one.

Q. How many did it get?

A. Received 5 steel cars, total of $5\frac{1}{2}$.

169 Q. $7\frac{1}{2}$.

A. $7\frac{1}{2}$.

Q. Entitled to one?

A. Entitled to one.

Q. On that same date how many was Eureka 28 entitled to?

A. Eureka 28 was entitled to—

Q. Unassigned?

A. Eureka 28 wasn't entitled to any. Received 3 steels, total wood basis of $4\frac{1}{2}$ excess.

Q. January 14th, Eureka 28 was entitled to how many?

A. Eureka 28 was entitled to 3. Received 19 hoppers, one steel. total $20\frac{1}{2}$ cars, excess $17\frac{1}{2}$ cars.

Q. How many did it order that day?

A. Eureka 28?

Q. Unassigned cars?

A. Eureka 28 only ordered 10 hoppers.

Q. And you gave it $20\frac{1}{2}$.

A. Yes. We happened to get it at that mine. The other mines went short.

Q. Weren't the other mines chuck full sometimes, their sidings so full you couldn't put any on any way of system cars?

A. I am not in position to say that.

Q. Don't your notation show frequently through this period the siding was full of individual cars and that is the reason they didn't get any other cars?

A. No.

Q. Don't your sheets show that?

A. After February 1st, 1906, there would be shown in the bottom of the sheet and no occasion to put them in the remarks.

Q. In the remarks before that time isn't it shown frequently?

A. It is shown, but I don't know just how frequently.

170 Q. Isn't it shown pretty near every other day?

A. For Berwind mines combined?

Q. Yes.

A. I think that is putting it a little too strong.

Q. Isn't it shown every third day?

A. I will say every third day then.

* * * * *

Q. You deny in addition to the few days I called your attention to there are a great number of days on which Berwinds got unassigned cars beyond their rating?

A. The car distributor——

Q. Answer that question please, then you can explain it?

A. Well I would say, no.

Q. There aren't a great number?

A. As a general proposition there are not a great number. There may be some days.

Q. Now, we quit on January 14th, 1907. Don't you know or can't you ascertain from examination of the sheets that the same thing prevailed with reference to Berwinds mines on the following dates: January 15, 16, 18, 21, 22, 23, 24, 25, 26, 28, 29, 30 and 31, 1907?

A. Does this refer to Eureka No. 7?

Q. This refers to the Berwind mines, any of them in this group?

The COURT: Any of these 5?

Mr. LIVERIGHT: Yes sir.

A. Well the Berwind mines on January 8, or January 15 received 8 cars. On the 16th they received 8.

Q. That they didn't order? I am talking about operations receiving cars without having ordered them?

A. You will have to give me half a minute on it again.

Q. You understood the question?

A. Possibly I did at the time, Mr. Liveright, but I overlooked that part of it. No sir, the Berwinds ordered cars every day during that period, ordered up to about their limit.

Q. Sir.

A. I say the Berwinds during those dates ordered cars every day and received cars.

Q. And received cars. Don't you know that during each 171 of these days the Berwind mines received more cars than they were entitled to on their orders, mine for mine. Take Eureka No. 28 on the 21st of January?

A. Yes sir.

Q. How many was it entitled to?

A. It was entitled to 11 and received 11, but the other two mines were 11½ short.

Q. That is the way you tried to even them up?

A. Yes sir, in all these cases they were balanced up.

Q. All these cases?

A. Not all of them. They were about even.

Q. Just out of goodness of your heart, when Berwind mine, didn't order any cars you would place them there because you thought one of them was short?

A. Yes, the Berwind mine ordered cars every one of these days.

Q. Not for the particular mine?

A. No, possibly not for the particular mine.

Q. When Falcon 2 ordered cars and was short on its own percentage, did you give it cars Falcon 4 should have had and didn't order?

A. No, they weren't so situated they could do that.

Q. They were never so situated in fact were they?

A. But those mines had an independence, they were never grouped.

Q. Never grouped together?

A. Considered as one operation you might say, as Berwinds were.

Q. They were all the same ownership on the sheets?

A. You have got lots of them considered the same ownership, but Berwinds was the only one we grouped.

Q. Just grouped them together?

A. Yes sir.

Q. So they would get the benefit of the doubt?

A. No.

Q. Why did you single out Berwinds for this grouping, if you didn't do it for anybody else?

172 A. I understand these Berwind mines are grouped right there, they can do their own shifting.

Q. Don't you know some of them are miles apart?

A. They may be, but they can shift the cars to please them.

Q. They had their own motive power?

A. They can.

Q. Did they?

A. I don't know, but I know they do shift their cars.

Q. Don't you know they had nothing but Pennsylvania Railroad motive power?

A. No, I didn't know that.

Q. Didn't you hear testimony of witnesses on the stand to that effect?

A. I don't remember of it.

Q. Well it is in the case and you can't then explain why it was Berwinds mines were singled out and grouped together and if one mine was a little bit short the overage would balance it and *visa versa*?

A. About the 1st of January, 1906, but prior to that in most records Berwind mines were bunched and considered as one mine. It was done in the record as a convenience.

Q. It wasn't convenient for the Falcon mines to be grouped together; in other words, to be grouped together so the little game could be worked?

A. I am merely talking about the record after the distribution has been made.

Q. Your record shows constantly throughout the entire period of the action that a certain Berwind mine would not order cars and cars would be given to it?

A. They would be charged to it. The sheets show them as being given to that mine.

Q. You don't question that cars charged to Berwind were given to them, do you?

173 A. The cars shown on the sheet are charged to Berwind.

Q. You don't question the fact those cars were delivered to Berwinds?

A. No, I don't.

Q. You say the cars charged to every other operator were charged?

A. Yes sir.

Q. It is a fact throughout the period of this action cars not ordered by a certain Berwind mine would be given to it?

A. Yes, that certain operation it may be given to it.

Q. Didn't it occur at two or three operations on a single day?

A. It may have, yes sir, I am not questioning that.

Q. And with Berwinds it was a case of heads I win tails you lose, wasn't it, all the way through?

A. No sir.

Q. You think not?

A. Positive of it.

Q. Now don't you know these same conditions obtained in February and March, 1907, and April, 1907?

A. They may have, yes sir.

Q. Well they did, didn't they; if you have any question about it, look at your sheets?

A. In that way I will say they did, the one mine go short and the next mine have an excess.

Q. And they all had independent orders on these sheets?

A. Yes sir.

Q. And independent rating?

A. Yes sir.

Q. There wasn't any group order for so many cars or so many tons for the Berwind mines, was there?

A. No sir.

174 Q. And just out of charity where one mine had a little more than it could stand and the other was a little short, you would transfer it, wouldn't you?

A. In the aggregate record.

Q. I am not talking about aggregates, I am talking about independent mines?

A. I am merely talking about the record.

By Mr. BIKLE:

Q. He asked whether you did it out of charity?

A. Yes, if you want me to say that, certainly we did.

* * * * *

By Mr. LIVERIGHT:

Q. Now get your sheets for March, 1907. What is the distribution on March 7th, commercial cars to Eureka No. 7?

A. 7 hoppers and 3 steels, total of $11\frac{1}{2}$ cars.

Q. How many was it entitled to on its rating?

A. It was entitled to one car.

Q. And got $11\frac{1}{2}$?

A. $10\frac{1}{2}$ excess.

Q. Eureka 16?

A. Eureka 16 got 2 hoppers and 2 steels, total 5.

Q. How many was it entitled to?

A. Entitled to 2.

Q. Eureka 27?

A. Eureka 27 received 5 and was entitled to 2, excess 3. Eureka 28 was entitled to 11 and short 11.

Q. Eureka 7, 16 and 27 received from 500 to 1000 per cent more than they were entitled to, didn't they? Answer the question and don't worry about Eureka 22 or 28, they will take care of themselves?

A. About 200 per cent more.

Q. Only 200 per cent?

By Mr. BIKLE:

Q. How many cars?

A. It is $21\frac{1}{2}$ cars they received.

By Mr. LIVERIGHT:

Q. $21\frac{1}{2}$ cars received?

A. $21\frac{1}{2}$ cars received.

Q. Entitled to 5?

A. Entitled to 5.

175 Q. That is about 400 per cent, isn't it, more than they were entitled to?

A. Yes sir.

Q. What was the distribution for the day in the region?

A. 45 30/100.

Q. 45 30/100 per cent, and when the average general operator was getting 45 30/100 per cent of his distribution Berwind was getting 4 to 500, wasn't he, at these mines?

A. Yes sir.

Q. Now how many did Falcon 2, 3 and 4 get that same day?

A. Falcon 2 didn't get any.

Q. Falcon 3?

A. Falcon 3 didn't get any.

Q. Falcon 4?

A. None.

Q. How many cars on March 16th was Eureka 27 entitled to?

A. Entitled to 1.

Q. How many did it get?

A. Got 3, excess 2.

Q. How many was Eureka 28 entitled to?

A. Eureka 28 entitled to none, received 7, excess 7.

Q. Now these two mines were entitled to 1 between them and they got 10, didn't they?

A. Yes sir.

Q. That is, they got 1000 per cent of their deserts that day?

A. But was probably making up some shortage.

Q. I am asking about these mines?

A. Yes sir, they did.

Q. What was the general distribution that day?

A. 22 25/100 per cent.

Q. How many cars that day did Falcon 2, 3 and 4 get?

176 A. Well I suppose they didn't get any.

Q. Why, of course?

A. That is why he is asking. Falcon 2 received none and was entitled to 2 short 2. Falcon 3 and 4 received nothing. They were entitled to a car and a half between them.

Q. And didn't get any?

A. No sir.

Q. It is pretty easy to account for the 22 per cent distribution when Berwind and some other operators get 1000 per cent?

A. No, sir, not so easy. The fact remains they only had 22 55/100 per cent, no matter who got the cars.

Q. No matter who got the cars?

A. They had that percentage, no matter who got the cars, that is all they had to distribute that day.

Q. But Berwinds got a great deal more on that day?

A. Yes, a distribution of equal to 62 cars. That was the distribution for that day.

Q. 62 cars?

A. 62 cars.

Q. And Berwinds got 10 of them and they were entitled to one; is that it?

A. Just wait one half a minute.

Q. You want to correct that, do you?

A. No, I don't want to correct it?

Q. Or revise it?

A. That is all.

Q. You have nothing further to say about that day?

A. About that day, no sir.

Q. The cars remain fixed at 62, do they?

A. Oh yes.

Q. They haven't varied since you looked at the sheets again?

A. No, not in that short a time.

177 Q. Now take March 19, Eureka 28 was entitled to how many?

A. Entitled to 7.

Q. And got how many?

A. 27½. 20½ excess.

Q. Get April now, 1907?

A. Just wait till I have a look here, if you please.

Q. You are satisfied?

A. I am satisfied you got your share all right. April 1906?

Q. 1907. How many cars was Eureka 7 entitled to on April 17th?

A. Entitled to 3½.

Q. How many did it get?

A. 10½, excess 7.

Q. What was the general distribution for that day?

A. The other Berwind mines were 9 short.

Q. Even so what was the general distribution?

A. 45 63/100 per cent.

Q. When there was 9 short at the other mines they got twice as large a percentage of cars as the general distribution?

A. Not considering the Berwinds as a whole?

Q. As a whole?

A. No sir.

Q. Figure it out?

A. They got twice as many cars as the distribution entitled them to.

Q. As the general distribution for the day. Didn't they get about 90 per cent of what they were entitled to?

A. 7 over and 9 short. That would leave them a shortage of 2 combined.

Q. Then they got about 90 per cent didn't they of their share?

A. No sir, he only got 45 63/100 per cent.

178 A. Are you sure of that?

A. Yes sir.

Q. Don't you know that is just the general distribution in the district, not what Berwind got?

A. Berwind would have to get his proportion of 45 per cent in the district.

Q. Not necessarily. If Berwind got 80 per cent and Falcon got 20 per cent, it might average up?

A. But I understood you to say what per cent Berwind got.

Q. Yes, I am still asking that question. How many unassigned cars was he entitled to that day?

A. He was entitled to 12.

Q. And he got 10½?

A. Got 10½

Q. Now what percentage is that?

A. 80 or 90 per cent.

Q. The general distribution was 45 63/100, wasn't it?

A. Yes sir.

Q. Somebody must have gotten a good deal less than 45 63/100 to equalize?

A. Somebody, yes sir.

Q. Take April 19th?

Mr. GOWEN: One question I want to ask just there.

Mr. LIVERIGHT: Now we object to the interruption of the cross-examination.

Q. Turn back to the 18th. How many cars was No. 7 entitled to that day?

A. Entitled to one.

Q. How many did it get?

A. Received 4½, excess 3½.

Q. How many was 28 entitled to?

A. 28 was entitled to 7½ cars, received 20½, excess 13.

179 Q. That is it got 20½?

A. Yes sir.

Q. And it didn't order that many, did it?

A. Well it ordered 24.

Q. Ordered 17, didn't it?

A. Ordered 24. 7 charged against the rating would leave 17 rating for unassigned.

Q. It ordered 17 against the unassigned rating?

A. They ordered 24, but we took off 7.

Q. That left 17 for unassigned?

A. Yes sir.

Q. Against that 17 it got 20½?

A. Yes sir.

Q. That same day the region distribution was how much?

A. 44.

Q. 44 per cent. Wasn't that practice very common during the month of April, 1907?

A. I would say it wasn't.

Q. These were exceptional days?

A. These were exceptional days.

Q. We will try to satisfy you later that they were not. Now get the sheets for October, November and December, 1905. Look through October, 1905, and see whether there are any cars charged to Eureka 16?

A. That would be from the 16th of October, would it?

Q. The 16th, yes sir?

A. There were 4 P. R. R. steels on October 30th.

Q. What is it charged with for November?

A. One hopper and 3 steels on November 7th. That is all I can find in November for Eureka 16.

Q. How about December?

A. Can't find any in December.

Q. Then for October, November and December all the cars appearing on the sheets as charged to this mine are the ones to which you have referred in going over the sheets just now: 4 P. R. R. steels October 30th, one line and 3 steels on November 7th and none in December?

A. That is a hurried examination, yes sir.

Q. In making up Exhibit No. 20, you included in the cars distributed to the Berwind mines only those shown with reference to No. 16 on your distribution sheets?

A. All the cars placed at the Berwind's and of course there at Eureka 16 would be included in these.

Q. And only those that you have testified to as being noted on the distribution sheets against 16 have been included in this count against 16?

A. Yes. No matter what operation they were placed at we would still count them as the Berwind's.

Q. The same applies to the manner in which you made up No. 28, doesn't it?

A. Yes sir.

Q. In other words, in making up Exhibits 20 and 28 you have charged Eureka 16 mine for those three months with a total of 7 steels and one line car?

A. That is included in the total for the Berwinds.

Q. That is all you have included for 16 mine in those three months?

A. Yes sir.

Q. Either assigned or unassigned?

A. If there were no cars placed there, there are none included.

Q. And if there are none shown as having been placed there on the distribution sheets, you of course didn't include any in making up these tables?

A. No sir.

Q. On the stand the middle of the week Mr. E. B. Chase, the manager of the sales department of the Berwind mines, testified that in October, 1905, there were 152 cars shipped from Eureka 16; in November 1905 there were 146 cars shipped from Eureka 16; and in December 1905 there were 166 cars shipped from Eureka 16?

Mr. BIKLE: Mr. Chase testified that is what was reported to him.

Mr. LIVERIGHT: He testified as manager of the sales department.

Q. Now the question is, when do you expect to get them on the distribution sheet against Eureka 16?

A. We couldn't charge them against Eureka 16 at that time. They were combining the Berwind mines, but they were charged against some other mine.

Q. You don't know that is the fact in this particular case?

A. Not those cars Mr. Chase refers to I don't know.

Q. You don't know as a fact that these cars Mr. Chase testified to having been shipped from Eureka 16 have been charged against the Berwind mines at all?

A. No, I couldn't say that. They would have to be shown on the sheet before I could say anything about that.

By Mr. BIKLE:

Q. During those three months were the Berwind operations treated as a combined proposition?

A. Yes sir.

Mr. LIVERIGHT: We object to the form of the question. It is their own witness.

By Mr. COLE:

Q. Aren't you contradicting your own sheets? Look and see whether they are carried separately or altogether?

A. I will look at the sheets.

Q. How are they carried?

182 A. They are carried as a whole, that is the total. The company coal is shown as an order at one mine and the commercial coal shown as an order at another mine, but then the cars distributed were bunched as shown at one mine. But that was up to about 15th January 1906. Then they start to show the orders and cars charged to each mine.

Q. Aren't each mine rated separately on your sheets?

A. Yes sir.

Q. And each mine is carried separately?

A. Yes sir, that comes under the authority of having a group of mines in the same vicinity. At this time he could take advantage

of the car supply by counting all his mines, get the rating of all his mines but having all the cars placed at the one. It was done for accommodation of the operator, I understand.

By Mr. LIVERIGHT:

Q. Don't you know from the sheets that during this very time——

Mr. BIKLE: I beg your pardon, at what stage are we?

Mr. LIVERIGHT: I didn't turn him over for re-examination.

Q. During this period, October, November and December, 1905 isn't it a fact that the Berwind mines are charged separately with the cars received? Each mine?

A. Charged separately with the cars received?

Q. Yes, on your sheet?

A. One mine got them all.

Q. 3 cars?

A. They are all charged to one mine.

Q. See if they are all charged to one mine?

A. Yes sir, I thought you were speaking of unassigned cars.

183 Q. No, I am talking of cars?

A. Then we have to go all over this again, because I understood it was all unassigned cars. The individual cars are lumped. There they are, lumped at one mine.

Q. At what mine?

A. It is usually charged to No. 22. They are charged on different mines.

Q. Do you know where that is with reference to No. 27?

A. No sir, I don't.

Q. The system cars distributed to the Berwind mines during this period are charged against the mines separately, aren't they, in October, November and December?

A. Charged against the mines separately?

Q. Yes sir?

A. I will have to take a look on that. I said they weren't. During this period the individual cars were shown as being placed at one mine. Now there are two different mines the unassigned cars are shown placed at. Company is shown as placed at one mine.

Q. What mines were the unassigned cars shown as placed at,—the same mines throughout?

A. No sir, it is No. 16 I think. Company coal was usually shown at No. 7. The individual usually was shown at 22, and the other two where they were shown as receiving commercial cars to the best of my knowledge from reading over these sheets were at 16 and 28.

Q. Now you are not prepared to say that these cars that Mr. Chase swore to as having come from Eureka No. 16 were cars actually charged against any other Eureka mine there, are you?

A. No, I can't.

Q. You couldn't swear to that?

A. I couldn't swear to that and don't know.

Q. It may be so and may not?

184 A. Yes sir. My source of information is from the distribution sheets.

Q. Take the Cresson sheets. Take the C. & C. Division sheet for April, 1907. Refer to April 15th. Now the cars actually over on the siding on the 15th would appear in your report of the 16th, wouldn't it?

A. The cars over on the siding on the 15th?

Q. Yes, would appear on the report of the next day?

A. Yes sir.

Q. You wouldn't be able to get the reports in until the evening of the 15th probably?

A. No, they wouldn't be cars over until the evening of the 15th.

Q. And they would show up on your sheets for the 16th?

A. Yes sir.

Q. At Urey and Glenwood mines on April 15th Mr. Bryson counted 16 steels over. Now what does your report of April 16th show on that subject?

A. 16 steels over as he reported them on the 15th?

Q. He counted them on the 15th, just the same as your people would count them. What does your report of April 16th show on that subject?

A. It doesn't show any over at Urey 2, 3 and 5.

Q. Doesn't it show 6 steels?

A. Yes sir, it shows 6 steels over.

Q. At Urey 1?

A. Urey 1 shows one over.

Q. And Glenwood 9 how many over?

A. Glenwood 9 shows 4.

Q. If Mr. Bryson's report of the cars standing over at these mines was correct, your sheets are short 5 steel cars for the day, aren't they?

A. How many does Mr. Bryson report?

185 Q. 16?

A. Yes sir.

Q. And your report shows 11?

A. There would be. We would be short 5 on that count of 16.

Q. Assuming Mr. Bryson's count would be correct?

A. Yes sir.

Q. Now on the 16th Mr. Bryson's report and testimony shows 10 steels and 5 lines over at the Urey Ridge and Glenwood mines. How many does your sheet of the 17th show over that day?

A. Well it depends a good bit when Mr. Bryson saw this siding.

Q. Just answer the question?

A. My sheet for the 17th shows Urey 2 and 3 as having 3 over.

Q. 2, 3 and 5?

A. Yes, 2, 3 and 5.

Q. Urey No. 1?

A. Urey No. 1 had 4 foreign hoppers.

Q. Urey No. 6?

A. Urey No. 6 had 2 over.

Q. Glenwood No. 4?

A. Glenwood 4 didn't have any.

Q. Glenwood No. 9?

A. Didn't have any.

Q. Well then that makes a total of 5 steels and 4 lines shown over by your records. If Mr. Bryson's testimony was correct, your records would be short 5 steel and one line, wouldn't it?

A. Yes sir.

Q. Take April 17th?

A. We are on the 17th.

Q. Take April 18th sheet, Mr. Bryson's testimony and report for conditions at the mines on April 17th show 14 steel
186 and 11 line cars over at the Williams mines. What does your record show for the same day?

A. It shows 3 wood, 14 steel and 3 foreign at the combined Williams operations.

Q. If the testimony and report of Mr. Bryson is true, your records would show a shortage of 5 line cars then, wouldn't it?

A. I have forgotten Mr. Bryson's figures, but I suppose it is all right.

Q. His was 14 steels and 11 lines, and yours 14 steels and 6 lines?

A. Yes sir.

Q. Get the next day. His report of April 18th shows 18 steel and 13 lines over at the Williams operations. What does your record show?

A. It shows 3 wood, 16 steel and 6 foreign.

Q. Then your record would be short as compared with the observation of Mr. Bryson to the extent of 2 steel cars and 4 lines?

A. No, I am 3 cars over Mr. Bryson's and 4 cars short on the line, 8 cars short on the line.

Q. How many steels do you make it?

A. 16.

Q. His was 18?

A. I understood 13 steel and 18 line.

Q. No, just the reverse?

A. Then I am short 2 steels and 4 lines.

Q. Take the next day. Mr. Bryson's report showed 11 steels and 19 lines over. What does the report show for that day?

Mr. O'LAUGHLIN: That is the 19th?

Mr. LIVERIGHT: It would be the sheet of the 20th. Observation made the 19th.

A. 3 wood, 10 steels, 2 foreign. That would be short one steel and 14 line.

187 Q. 1 steel and 14 line short?

A. Yes sir.

Q. Take the sheet of April 24th. Mr. Bryson's report for the conditions at the sidings on April 23rd shows 33 steel and 13 line over. What did your records show?

A. Shows 4 lines or 4 wood, 22 steel and 4 foreign steel. That is 26 against 33 and 4 against 13.

Q. Your shortage was 7 steels and 11 line cars as compared with the observation of Mr. Bryson?

A. No, 4 against 13. 9.

Q. Get your sheet for April 25th. Mr. Bryson's observation showed 31 steels and 14 lines empty and over on the sidings. What were your observations?

A. I have 4 wood and 12 steel.

Q. Then your record would be short as compared with the conditions existing 19 steel and 10 line, wouldn't it?

A. Yes sir.

Mr. BIKLE: If Mr. Bryson's statement is correct?

Mr. LIVERIGHT: I didn't think it was necessary to repeat that every time.

Q. Is this 1907. April sheets you are looking at?

A. Yes sir, 1907.

Q. The report of April 20th, which would show on your report of April 22nd, indicates 14 steels and 15 line over. What does your reports show?

A. Shows 5 wood and 5 steel against 15 line and 14 steel.

Q. A shortage of 10 line and 5 steel?

A. 5 steel.

Q. Get your next day, which will be the last to which I will direct attention. April 23rd. The report of Mr. Bryson for April 22nd shows 18 steel and 7 line cars over. What does your report show on the subject for that date?

A. 15 steel and 4 line against 18 steel and 7 line.

188 Q. It would be a shortage of 3 steel and 3 line for that day, assuming Mr. Bryson's testimony to be correct?

A. Yes sir.

Q. Now you have already stated that you had no way of ascertaining whether these reports are the correct representations of the conditions on the sidings, haven't you?

A. Yes sir.

Q. You just have to take the reports?

A. That is my authority for it.

Q. Now available cars, as I understand it, in the tables made up by you include the empty cars over at the sidings as shown by your distribution sheets?

A. Yes sir.

Q. And it is on those records that you have made up these tables both as to Berwind and the Williams mines and the mines of the plaintiff, indicating your setting up the number of available cars for distribution at the respective mines?

A. Yes sir.

Q. And if your records are not correct as to the number of cars over and you have charged Williams, for instance, with a less number of empty cars over standing on his siding than actually were standing there, your tables would be wrong, wouldn't they?

A. They would. In other words, if the distribution sheet would be wrong, the tables would be wrong.

* * * * *

189 G. E. OLER on stand.

By Mr. LIVERIGHT:

Q. Do you have those rating figures at hand?

A. Prior to November 4, 1905, Urey 2 had a rating of 250 tons or 10 cars. After November 4, 1905 Urey 2 was shown with No. 3 and 5 and the rating of the combined mines was shown at 500 tons.

Q. Prior to that date what was the rating of 3 and 5?

A. The rating of 3 and 5 was 20 cars, 500 tons.

Q. 500 tons?

A. Yes sir.

Q. As of what date?

A. Prior to November 4, while the operation known as 3 and 5 and known as 2, 3 and 5 after November 4 had a rating of 20 cars, up until December 1st, when a new sheet went in, when it was given as 22 cars.

Q. 22 cars?

A. A new issue of the sheet December 1st, 1905, yes sir.

Q. Of what size, how many tons each?

190 A. December 1st of 35 tons.

Q. That is to say, the first change made in these ratings after Urey No. 2 was combined with 3 and 5 showed an increase from 500 tons to 770 tons?

A. Yes sir.

Q. Now there was no opportunity to make changes in the interval between November and December, was there?

A. Nothing any more than just noting on the sheet.

Q. That is, there wasn't any general readjustment of ratings in the interval between the classing of No. 2 with 3 and 5 and this change in December when the basis was 35 net tons to the car?

A. No sir.

* * * * *

191 (Copy of Defendant's Exhibit No. 28.)

Falcon No. 4, Tyrone Division.

	Monthly Region Rating.	Monthly Mine Rating.	Per cent.	Cars Received.	Per cent of Receipts.
1905—					
October	12068	56	0.5	7	12.5
November	17628	76	0.4	9	11.8
December	12050	50	0.4	6	12.0
1906—					
January	14607	54	0.4	7	13.0
February	13440	48	0.4	21	43.7
March	15093	54	0.4	21½	39.8
August	16092	54	0.3	3½	6.5
September	15100	50	0.3	11	22.0
October	16335	54	0.3	25½	47.2
November	16198	92	0.6	33½	36.4
December	15850	100	0.6	54	54.0

1907—					
January	16770	104	0.6	93	89.4
February	15528	96	0.6	44½	46.3
March	16796	104	0.6	73	70.2
April	17160	112	0.6	83	74.1

(Copy of Defendant's Exhibit No. 27.)

Falcon Mines Nos. 2, 3 and 4, Tyrone Division.

	Monthly Region Rating.	Monthly Mine Rating.	Per cent.	Cars Received.	Per cent of Receipts.
1905—					
October	12068	364	3.0	72	19.8
November	17628	384	2.2	78½	20.4
December	12050	300	2.5	63	17.7
1906—					
January	14607	324	2.2	81	25.0
February	13440	288	2.1	141	48.9
March	15093	324	2.1	137	42.3
August	16092	324	2.0	87½	27.0
September	15100	300	2.0	111½	37.2
October	16335	324	2.0	114	35.2
November	16198	392	2.4	130	33.2
December	15850	400	2.5	151½	37.9
1907—					
January	16770	416	2.5	250	60.1
February	15528	384	2.5	145½	37.9
March	16796	416	2.5	214	51.4
April	17160	448	2.6	237	52.9

(Copy of Defendant's Exhibit No. 33.)

192

Tyrone Division.

	Daily Region Rating.	Number days distri- bution was made.	Monthly Region Rating.	Assigned cars received wood basis.	Rating for unassigned.	Unassigned received wood basis.	Per cent of unassigned received.
1905—							
October	862	14	12068	2846	6222	2283	24.76
	874	13					
November	482	13	17628	5792	11836	2240½	18.93
December	482	25	12050	6083	5967	1778	29.79
1906—							
January	541	27	14607	5869½	8737½	2368	27.1
February	560	24	13440	7201½	6238½	3172½	58.57
March	559	27	15093	10451	4642	2994½	64.51
August	596	27	16092	10996	5096	3225½	63.29
September	604	25	15100	7261½	7838½	3524	44.96
October	605	27	16335	7888½	8446½	3318½	39.29
November	623	26	16198	6145	10053	3271	32.53
December	634	25	15850	7061	8789	3950	44.94
1907—							
January	645	26	16770	7688½	9081½	6540	72.02
February	647	24	15528	4898	10630	3440	32.36
March	646	26	16796	8346	8450	4306½	50.96
April	660	26	17160	7234	9926	5392½	54.53

193

DEFENDANT'S EXHIBIT No. 7.

* * * * *

By combining the commercial capacity of a mine, thus ascertained and constantly brought up to date, with the physical capacity, the rating of the mine in the distribution of coal-car equipment is determined. And if this system of rating is equitably applied to all mines served by the defendant we are unable, so far as our investigations to the present time have informed us on the question, clearly to see upon what grounds it may be said to result in an unequal, unfair, or discriminatory distribution of its equipment.

* * * * *

194 P. E. WOMELSDORFF recalled on part of plaintiff, in rebuttal.

* * * * *

Q. Have you had occasion in past years to make an examination of the Urey Ridge Coal Company's operations?

A. Yes sir, from 1892 along up until the close of about 1904 I visited it almost continuously.

Q. In what capacity?

A. I represented the land owners, the Clearfield & Cush Creek Coal & Coke Company. It was my duty to visit the mine and examine and report as to the condition of the workings and character

195 of the coal and such things as that.

Q. I ask you what this map is that I hand to you. (No. 44)?

A. That is a map showing the various coal fields in the Cush Creek region as worked by the Urey Ridges and Glenwood and Reighart and Indiana and other mines, showing the areas of the different seams upon the hill top where they were worked.

Q. Who made that map?

A. That was made by my assistant under my directions.

Q. Does it show the property worked by the Urey Ridge Coal Company at Urey Ridge mines 1, 2, 3 and 4?

A. It shows the ridge upon which they were working, yes.

We offer this map. (Marked Plaintiff's Exhibit No. 44.)

Mr. GOWEN: I don't understand this is rebuttal of anything at all.

The COURT: I don't understand how this is rebuttal.

Mr. LIVERIGHT: This map, together with the testimony by which we intend to follow it, is offered for the purpose of showing by the witnesses that the Urey Ridge mines, which are carried on the distribution sheets of the defendant during the period of this action, particularly Urey Ridge mine No. 2, were exhausted and not entitled to any place on the distribution sheet.

Mr. GOWEN: Mr. Riddle testified on his examination in chief he thought one mine was over-rated. We called a witness to show the examination he made of the mine and the figures, and he gave what

he thought was the result of the examination. If they are going to rebut that, we have no objection.

196 The COURT: On the question of unfair rating between Falcon 5 and 6 and the Ureys?

Mr. LIVERIGHT: That is the point. Mr. Weary estimated the output at 1200 tons.

The COURT: I suppose anything that would rebut that testimony would be competent.

Mr. GOWEN: We have no objection to that.

By Mr. LIVERIGHT:

Q. What is the character of the country or coal territory that was operated by the Urey Ridge Coal Company when you represented the land owners?

Mr. GOWEN: State the purpose.

Mr. LIVERIGHT: The purpose of it is to show that the contents of the property was not sufficient to warrant any such conclusion as was reached by Mr. Weary.

Mr. GOWEN: Is it confined to Ureys, 2, 3 and 5?

Mr. LIVERIGHT: Ureys 2 and 3. No. 5 doesn't appear on there.

Mr. GOWEN: We object to the question, unless it is confined to an inquiry as to mines, 2, 3 and 5.

The COURT: As I understand, it is to be confined to that.

Mr. LIVERIGHT: We are not going to refer to any other mines than those. We may not refer to all of them.

The COURT: Proceed.

A. The territory worked by the mines 2, 3 and 5 was an extremely narrow ridge of coal, lying well up in the hill, and I don't
197 suppose having a width directly across the working line of over a thousand feet. I shouldn't imagine it would be over a thousand feet, a narrow ridge of coal in what is known as the C Prime seam of coal.

By Mr. LIVERIGHT:

Q. How many acres of it were there?

A. All told?

Q. Yes?

A. In the 2, 3 and 5?

Q. Yes?

A. It is a difficult matter to answer this, because the No. 2 never had any defined areas as to what they were going to take out. It was a mine opened up after No. 1 and supposed to take out a certain area of coal, its limits were never defined and therefore it would be almost impossible for me to say what was the territory included in the limits of 2, 3 and 5 mine.

Q. How much coal was there in the ridge tributary to 2 and 3?

A. To 2, 3 and 5?

The COURT: You mean in acres?

A. I should roughly say there ought to have been about 75 to 100 acres of coal in that neighborhood in the solid that might be included in the 2, 3 and 5 area, as near as I can figure out at this time.

By Mr. LIVERRIGHT:

Q. When you ceased being agent for the Land Company what proportion of that was mined out?

A. Well that proportion controlled by the No. 2 mine, ceased operating in the latter part of 1902. There was very little, if any, not over 2 or 3 days' work done in the No. 2 mine after 1902, because the area supposed to be controlled by that or the coal that could be practically removed by the No. 2 operation was taken out and the balance of the so-called solid coal was to be taken out of the No. 3 and 5 and some small amount by No. 1.

Q. Was all they had left at that time Nos. 3 and 5?

A. That is when you speak of 2, 3 and 5?

Q. Yes?

A. Yes, 3 and 5 was about all the solid coal that was left.

Q. Do you know how many acres there were approximately?

A. No. 3 and 5 had just been opened up. I don't suppose there was over 60 acres of coal. I don't think there was over that amount.

Q. At what date?

A. That is along about the latter part of 1904. So whatever was removed after that would make the area so much less at any fixed date after that.

Q. Producing as much as 1200 tons of coal a day would Nos. 3 and 5 have lasted any considerable length of time at all?

A. Under steady work?

Q. Yes?

A. No, if the work had been continuous and steady say for 200, or at that rate if such things were practically it wouldn't have lasted over a year or two.

Q. Assuming that work had been kept up there at the rate of 1200 tons a day, from the time you left until October, 1905, state whether or not the entire hill would have been practically exhausted?

A. From the time I quit in 1904?

Q. Yes, until the middle of October, 1905?

A. No, I don't think it would have been exhausted in that time.

Q. That is not long enough?

199 A. No, that is not a long enough time, even if such thing was practicable it would be utterly impossible to keep up an output of 1200 tons a day on a dying mine on a narrow ridge, for your output would be largely pillars where your output must drop off.

Q. Do you know anything about the side tracks at these mines 2, 3 and 5?

A. I can't speak positively, no sir, I can't speak.

Cross-examination.

By Mr. GOWEN:

Q. 2, 3 and 5 are still working, aren't they?

A. I can't speak as to just this date, but No. 2 couldn't be working, it wasn't working at that time, it died in 1904. When you

speak of No. 2, 3 and 5, No. 2 is a misnomer and has been out of existence a long time, unless it started a year ago.

Q. Do you recall testifying to this fact in this Court in an action in which the Hillsdale Coal Company was plaintiff and the Pennsylvania Railroad defendant? By Judge Krebs: What about No. 2, Urey Ridge No. 2? A. Urey Ridge No. 2 was abandoned for the reason they had made arrangements to take the coal remaining out from No. 3, being at a lower level they could better remove it and also some by means of No. 1. Is that right?

A. Yes, that is correct.

By Mr. LIVERIGHT:

Q. Was there enough left there to keep up the No. 2 operation?

A. They didn't think so, no sir, that is the reason they abandoned it.

Q. What was left there at that time?

A. Nothing left there at No. 2 except the pillars. Just a few pillars standing throughout the No. 2 mine. The solid coal standing at this time had been arranged to be taken out through other mines.

200

Motion to Strike Off Demurrer.

And now, Nov. 18th 1912, the Plff. by its Attys. moves to strike off the Demurrer filed by Deft. on Nov. 16th 1912, for the following reasons:

1. The Deft. having filed a plea of the general issue which is still of record the demurrer is too late.

2. The Deft. by taking an exception to the filing of the amended statement ex-austed its rights in the premises.

3. If the Court should decline so to do the Plffs. then move that the demurrer be overruled.

LIVERIGHT,
COLE,

Att'ys for Plff.

Endorsed: "Motion to strike off demurrer." "Granted by the Court." Filed Nov. 18, 1912. John H. Moore, Prothonotary.

201 *Motion to Amend Statement as to Amount Claimed.*

And now Nov. 25, 1912, the plff. by its Attys. moves the Court for leave to amend the statement of claim so that the claim may read three hundred thousand dollars as the ultimate amount claimed instead of two hundred thousand.

A. M. LIVERIGHT,
A. L. COLE,

Att'ys for Plff.

Endorsed thereon: No. 148 Dec. T. 1911. Clark Bros. Coal Mining Co. vs. The P. R. R. Co. Motion to Amend. Am't Claimed. Nov. 25th, 1912, motion allowed by the Court. Exception noted for Def't. Bill sealed by the Court. Liveright. Cole. Filed Nov. 25, 1912. John H. Moore, Prothonotary.

202

VI. *Charge of the Court.*

SMITH, P. J.:

Gentlemen of the Jury, you have been sworn in a case in which the Clark Brothers Coal Mining Company, a corporation duly chartered under the laws of the State of Pennsylvania, is the plaintiff, and the Pennsylvania Railroad Company, also a corporation chartered under the laws of Pennsylvania, is the defendant. The suit is brought as an action of trespass, to recover for injuries alleged to have been sustained by reason of undue and unreasonable, and, therefore, unlawful discrimination, claimed to have been practiced by the defendant Company against the plaintiff Company in its distribution of cars between October, 1905, and April 30th, 1907, with the exception of four months, April, May, June and July of 1906, during which there was a strike in the coal region and the plaintiff Company was not operating.

The plaintiff Company, during the period sued for, operated three mines in what is known as the Houtzdale coal region, called the Falcon No. 2, situate at Smoke Run, and Falcons Nos. 3 and 4, situate near McCartney, on the Moshannon Branch of the Tyrone & Clearfield Railroad. The plaintiff Company also operated, during a portion of the period sued for, what is known as Falcons Nos. 5 and 6, situate on the Horton Run Branch of the Cush Creek Division or Branch of the Cambria & Clearfield Railroad Company, which mines are situated in Indiana County.

203 The defendant Railroad Company obtained its charter by an Act of Assembly passed in 1846 by the Legislature of the State of Pennsylvania, and is the operating company which, during the period for which this suit is brought, operated both the Tyrone & Clearfield Railroad as a branch line, and the Cambria & Clearfield, with its branches, including the Cush Creek and Horton Run branches.

Before explaining the particular phases of the controversy involved in this case, I will try to explain as briefly as possible the duties of a railroad company with respect to its patrons or shippers. The charter grant from the State of Pennsylvania to the Pennsylvania Railroad gave it certain privileges, such, for instance, as the right of eminent domain, and these special privileges were granted on the implied condition and requirement that the said railroad should serve the public as a public highway and as a common carrier, with all the incidents of liability as well as all the incidents of privilege attached to such relation to the public. The duties of a common carrier with respect to the public were common law duties, even prior to their being enacted into our Constitution and statutes. For instance, a common carrier was at common law bound to extend to all persons, under similar circumstances and conditions and during the same period of time, the equal enjoyment of all facilities for transportation and could not discriminate as to rates. In addition to what we generally call the common law duty, how-

ever, the Constitution of the State of Pennsylvania, enacted in 1873, endeavored to safeguard the general duties of the common carriers and protect the public by making the following provisions under Article 17 of the Constitution. Section 1 of said Article 17 says: "All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers." Section 3 of the same Article relates particularly to discrimination, in which it is said: "All individuals, associations and corporations shall have

204 equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for,

transportation of freight or passengers within the State or coming from or going to any other State." Section 7 of the same Article is also a discrimination clause, and uses the following language: "No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise, and no railroad or canal company, or any lessee, manager or employee thereof, shall make any preferences in furnishing cars or motive power." The Legislature of Pennsylvania, in order that these constitutional provisions might be made more effective, and also in order that offenses against the Constitution should be to some extent penalized, on the 4th day of June, 1883, passed an Act to aid in carrying out the provisions of the Constitution. The title of this Act is, "To enforce the provisions of the seventeenth article of the Constitution relative to railroads and canals." This, as will be noticed, refers especially to the article of the Constitution out of which I read certain sections. This Act of 1883, therefore, was practically in aid of the enforcement of the whole of Article 17, out of which I have already read you three sections particularly applicable to the case in hand. Section 1 of this Act of 1883 is as follows: "Be it enacted, That any undue or unreasonable discrimination by any railroad company or other common carrier, or any officer, superintendent, manager, or agent thereof, in charges for or in facilities for the transportation of freight within this State or coming from or going to any other State is hereby declared to be unlawful." Section 2 says: "No railroad company or other common carrier engaged in the transportation of property, shall charge, demand or receive from any person, company or corporation, for the transportation of property, or for any other

205 service, a greater sum than it shall charge or receive from any other person, company or corporation for a like service, from the same place, upon like conditions, and under similar circumstances; and all concessions in rates and drawbacks shall be allowed to all persons, companies or corporations alike, for such transportation and service, upon like conditions, under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals, or between individuals and transportation companies, or the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages

treble the amount of injury suffered." The third section is a penal clause punishing for violation of the law officers of said company who authorize violations, by process in the criminal court and as this has no reference to the case in hand we will not read it.

You will see, therefore, Gentlemen of the Jury, that these sections, both of the Constitution and of the legislative enactment, are important provisions of the law and their enforcement is placed upon courts and juries in proper cases and under proper circumstances. The general public welfare is sought in the enactment of these constitutional and legislative provisions and the general public are interested in having every facility of transportation extended alike to all who may be in a position to demand public service. The duty of every railroad in the State of Pennsylvania, as a common carrier, is therefore clear, and that duty is to furnish to all shippers of commodities, under like circumstances and conditions and during the same period of time, the same facilities for transportation and at the same rates. The question, however, in every case which comes before the Court and jury is, whether the proof amounts to a demonstration, by the weight of evidence, that there has been a violation of either the common law or legislative enactments.

206 In this case it is alleged on behalf of the plaintiff, first, that there was an inadequate and insufficient supply of cars by the defendant corporation, by which it suffered injury; and second, that the defendant company practiced, during the period in question, discrimination or unfairness in car distribution and in car ownership privileges, whereby the plaintiff suffered injuries. The first branch of this case then is on the question of insufficient and inadequate car supply, and because the principal evidence related to discrimination this feature of the case has not been pressed to the same extent on your consideration by Counsel for plaintiff. It is, however, an element in the case for your consideration, because if you do not find the elements of discrimination present you can get to this question for the elements entering into the damage sustained. The principles of law applicable to this branch of the case are equally clear. For instance, after obtaining its charter from the State to do business as a common carrier and as a public highway, it is the duty of the railroad company to obtain necessary equipment for motive power and cars to reasonably fulfill the objects of its charter. In ordinary times such railroad must have a fairly sufficient car supply, as also a fairly sufficient motive power equipment, to be able to furnish to its patrons and customers the facilities of transportation of both freight and passengers offered. Unless, therefore, it does comply with the requirements, without a proper and legal excuse for non-compliance, it fails to do its duty and in case of injury to a shipper would be liable in damages.

Bituminous coal, as is well known, cannot be stored for any length of time, but must be promptly shipped. Car supply to the tipples of bituminous mines is, therefore, well known as an absolute necessity for the carrying on of the coal business. Such car service to any particular mine must be furnished with reasonable

regularity and constancy and also in reasonable quantity according to the capacity of the mine or according to its mining facilities. In ordinary times and when there is no period of stress or car shortage in the coal business, a common carrier is bound to furnish to an intending shipper of bituminous coal whatever cars may be shown to be reasonably necessary for the operation of said mine to fill its trade requirements. In times of special demand for bituminous coal there are of course periods when no railroad company could be expected to furnish all the cars demanded for the trade. In such times the railroad company may, and as a matter of practice do-, ascertain the capacity of the mining properties in the several regions and have a perfect right to apportion shipping facilities in accordance with a fair and equal pro rata division of its cars. Even in times of stress or car shortage, if a railroad company fails to properly apportion cars among its shippers and unfairly and unreasonably favors one shipper over another, that amounts to a discrimination for which the common carrier is liable. It is equally liable, however, if it fails to do its duty when there is no exceptional demand for cars and refuses, without a just and sufficient reason, to furnish cars on requisition for legitimate trade purposes. Now in this case, although, as I said a moment ago, the principal claim is one of discrimination, for which they ask not only single but treble damages, if you find the injury sustained is one which is rather one of inadequacy and insufficiency of car distribution rather than discriminatory acts, the basis of damages would still be the testimony offered in the case, but the damages which you could allow would only be single damages and not treble damages as claimed. There can be no duplication; that is, you cannot allow this plaintiff damages for injuries alleged to have been sustained by reason of inadequate and insufficient car supply and also for discriminatory acts during the same period. It is either one or the other, or neither, during a portion or all of the period, and of course according as you may find these facts your verdict must be.

208 Now, as we understand the proofs here, the plaintiff company claims the right to recover for alleged discrimination or difference in treatment between its several mines and other mines in the same locality or localities and having the same general features of output and freight rate. For the alleged injury which plaintiff claims to have sustained by reason of discriminatory acts of defendant, it also claims the right to recover treble damages under this Act of 1883, which I read. The discrimination alleged, according to the proofs offered, has two general features. First, that the rating of its several mines, in both the Moshannon and Cush Creek region-, was unfair and discriminatory. And second, that as to the mines on the Moshannon Branch, Falcons Nos. 2, 3 and 4, it was unfairly treated and discriminated against in favor of the mines of the Berwind-White Coal Mining Company, namely Eurekas Nos. 7, 16, 22, 27 and 28; and as to the two mines on the Cush Creek Branch, said mines were discriminated against in favor of the mines of D. E. Williams & Company, in the same locality. The plaintiff company, as Clark Brothers & Jacoby originally, became the owner

of Falcons Nos. 2 and 3 on October 16, 1905, and of Falcon No. 4 in January, 1906. Testimony was offered on behalf of plaintiff to show that Falcon No. 2 was equipped with electric haulage and had a physical output capacity to mine and ship about 600 tons of coal per day; that it had a considerable acreage of coal under lease contiguous to and minable out of said opening No. 2; that the coal there averaged 34 or 35 inches in thickness and was of a high quality, known as the Moshannon coal. That the coal of No. 3 had about the same thickness, and that the said mine was located near McCartney on the J. A. Pearce, Pearce Estate and Hopkins & Irvin tracts of land, having a considerable acreage sufficient to carry on the operation for a considerable length of time. That Falcon No. 4, also situate near McCartney, was an operation on the Moshannon vein,

and had a considerable acreage yet unmined, which was
209 tributary to and could be operated at said mine. Right at this point it is well for you to bear in mind that there is some controversy and dispute of testimony with relation to the quantity of coal, that is, its acreage, also as to the character of the coal. Certain witnesses were called on the part of the defendant to dispute the acreage of No. 3, and also to dispute the character of the plant and equipment at mine No. 2. Without going into detail as to the testimony on these subjects, it is for the jury to determine whether or not the plaintiff has satisfied you by the weight of the testimony that they were equipped as claimed; that they had the acreage or quantity of coal to be mined to warrant a rating as claimed for each of said mines, and that the coal was of the character and quality claimed for by the witnesses of the plaintiff. Mine- Nos. 2 and 3 had been operated prior to the purchase by the plaintiff company by W. F. Jacoby & Company, and as to the matter of rating it is claimed that soon after the property No. 2 came into the possession of the plaintiff company its rating was reduced from 450 or 500 tons to 9 cars or 315 tons per day. As to No. 3 mine, it is claimed on behalf of the plaintiff that it had a rating in October and November of 100 tons or 4 cars per day and that mine was reduced to one car per day in December, 1905, which remained at that rating thereafter until the close of 1906. On the question of rating also, it is claimed on behalf of the plaintiff that its mines Falcons Nos. 5 and 6 were not fairly rated in comparison with the Williams & Company mines in the same locality, and some testimony was offered on that subject.

On behalf of the defendant, as you will recall, Mr. Weary was called, who was the officer of the defendant company called the inspector, who goes on the ground and examines the physical features of the several mines and makes reports as to ratings for those mines, and did make such report as to the Cush Creek property
210 owned by the plaintiff company. Plaintiff called Mr. Riddle, superintendent of the Williams & Company mines, who I think admitted in his testimony that one of the mines was rated at 4 cars higher than they were able to produce, although I do not understand that he admitted that the general rating of all the mines was too high.

The principal complaint of the plaintiff corporation relates to the other branch of the alleged discrimination rather than the rating branch, namely, that whatever their rating they did not have a service of cars sufficient to enable them to carry on their business, and that their car service as against the Berwind-White Coal Mining Company's mines, in the Moshannon region, was decidedly unfair and discriminatory in character. Both Mr. Jacoby and Mr. J. O. Clark, stockholders and officers of the plaintiff corporation, testified to their numerous interviews, complaints and letters, in which they made an effort to increase the output of their mines; all of which testimony it is not now necessary for the Court to comment upon, for the same has been ably argued by Counsel. As to Falcons Nos. 2, 3 and 4, in Clearfield County, the plaintiff company, by evidence, endeavored to show the quality of the coal, the capacity of the mines, their ability to mine and ship, and also their ability to sell their product in the general market. It was in this connection testified strongly as to their constant demand for this coal in the general market and of their failure to ship coal anywhere near their capacity, or even near to their rating, which was much less than their capacity.

A great deal of testimony was taken to show the general features of discrimination, both in the Clearfield County mines and in the Indiana County mines. The testimony of Mr. Miller, the superintendent of Falcons Nos. 2, 3 and 4 during the period of the action, tended to show the irregular service of the defendant company of cars to each of these mines. I will not take any time to go
211 over those tables, as I think Counsel argued those to you a few moments ago. You will recall the testimony of Mr. Miller, however, in which he gave the number of days and hours actually worked at each of these mines. This testimony I think showed that for certain periods of several days at a time they had no cars, and hence their mines were shut down for days at a time. This testimony of Mr. Miller and the mine foreman on this subject you will bear in mind, because they also testified that the mines of their neighbors in that vicinity, operated by the Berwind-White Company, were operated full time as they allege and were not compelled to shut down as were the mines of the plaintiff company. The effect of this course of treatment was alleged by the plaintiff to be disastrous; it not only made the cost of the coal actually produced excessive, but so disorganized their force that when they did get cars they were unable to load them because their miners would be scattered and gone to other operations in that vicinity which had regular car service. The same line of testimony is produced to show the alleged discrimination respecting car service between Falcons Nos. 5 and 6 and the mines of the alleged preferred shipper, namely, the Williams & Company mines. Mr. Bryson was called, who was employed by the plaintiff to count the actual cars delivered to the Williams & Company mines and all other mines on the Cush Creek Branch, including the mines of the plaintiff company and other mines which are not in controversy here. He gave you in detail, as you recall, the cars actually received by the Williams & Company mines from day to day and the cars actually received by

the Clark Brothers Coal Mining Company from day to day. These cover a period of several months, including March, 1906, and then beginning again on the 11th of October, 1906, and running through the balance of the period of this action or up until the 1st of May, 1907. I will not take the time to go over this tabulation in detail, but will run over some of the totals to which attention is particularly called. During the month of March, 1906, Williams & Company received 664½ cars, this being on the basis of wooden cars with a capacity of 35 tons, steels one and one-half times as much. The Clark Brothers Coal Mining Company, during that month, received but 58 cars, and this table shows that for 6 days out of the month they did not get a single car while Williams & Company received cars every day during that month, and so on through the table; some of the months showing, I think three months or two months successively showing, that the plaintiff company's mines did not get a single car for 13 days during the month. All of those tabulations you will keep in mind for yourselves and I will not take the time to go over them. A comparison is also made on behalf of the plaintiff company between the percentages of unassigned cars received by Clark Brothers Coal Mining Company at its Falcon No. 5 mine and David E. Williams & Company at its Glenwood coal mines. Now by unassigned cars, you will recall, is meant cars of the Railroad Company which are subject to general distribution and not specially assigned to any particular mine. There are, you might say, four classes of freight cars which are the subject of distribution to the coal region, namely: Individual cars, that is, cars owned by the particular mine owner. Second, foreign fuel supply cars, that is, cars owned by other railroad companies than the defendant company, which are assigned to particular mines or companies or individuals, and of course cannot go to any other mines than the party to whom assigned. Third, fuel supply cars of the defendant company, by which is meant cars used by the Pennsylvania Railroad for its own fuel supply and assigned to particular mines. And fourth, its general system cars, those which are subject to distribution to anybody who may seek the services of the Railroad Company for coal service. In effect, however, and as applied to the facts in this case, there are practically only two classes of cars with which, as a matter of law, we have to deal, namely, assigned and unassigned cars. Assigned cars, of course, could not go to any other party or shipper or mine than that to which was assigned by the proper owner or party so assigning, and this applies particularly to individual cars and foreign fuel supply cars. It applies also to the defendant company's fuel supply cars, because, as we understand the law, they have a right to go out into the market and buy wherever they may see fit, although in some respects the matter would amount to a discrimination against certain shippers not to buy from them as well as buying from the others. Now, prior to January, 1906, individual and foreign fuel supply cars, in the ratings or pro rata distribution given by the defendant company, were not charged against the mines receiving them, so that an unfair advantage accrued to the owner of either individual cars or the party

receiving the fuel supply cars. In effect they got only their ratable proportion of the system or general supply cars, but in addition had the assigned cars on which to depend for operating their mines. The unfairness of this rule led to the rule promulgated, as shown by Mr. Trump on the stand, to the effect that all individual and fuel supply cars were to be charged against the rating of the mine to which they were assigned and that only that proportion of its rating over and above the assigned cars day by day should share in the general rating to the mines of the region. So that you see this rule of the Railroad Company itself prevailed during the larger portion of the period of this action. For the purposes of this case it may be considered that it was a fair rule of distribution, although it did in effect give to the mine having such assigned cars a distinct advantage over the mine not having any assigned cars.

Now, it is alleged on behalf of the plaintiff that as to both the Berwind-White mines known as Eureka Nos. 7, 16, 22, 27 and 28, and as to the Williams & Company mines in Indiana County, there was an unfair distribution and a preference given of the
214 unassigned cars to both competitors in the region, and tables are prepared showing percentages of unassigned cars received month by month by the plaintiff corporation at its Falcon mines Nos. 2, 3, 4 and 5 in comparison with tables presented for the mines of Berwind-White Coal Mining Company and Williams & Company. The Berwind-White Coal Mining Company, at its mines in this County, received a very large proportion of assigned cars, either individual or fuel cars, and these tables are made up to show, first, the percentage of the capacity of the mines taken by these assigned cars. These tables then show in another column the allottable capacity remaining which would have a chance to pro-rate in the assigned cars, and it is claimed on behalf of the plaintiff that these tables show that for quite a number of the months the assigned cars actually distributed to the Berwind-White mines occupied a very large percentage and even more than their total capacity and that they received unassigned cars in addition to a considerable percentage, in a few cases it is claimed even as high as 100 and in one case I think to 500 per cent, and the comparison is drawn by showing that at Falcons Nos. 2, 3, 4 and 5 a very much smaller per cent of the capacity for unassigned cars were received by those mines. Now the same comparisons by tables is presented with reference to Falcon Nos. 5 and 6, comparing them with Williams & Company's mines.

Now this alleged discrimination is disputed by the defendant corporation, by testimony offered in its behalf, given from the distribution sheets themselves. These distribution sheets were offered in evidence on behalf of the defendant company and were admitted to show what it is alleged by these sheets is shown to be the actual distribution of cars both to the plaintiff company and to its competitors in whose favor it is alleged discrimination was practiced. A large number of tables are offered by the defendant company as deductions and calculations going to show that the alleged percentages claimed on behalf of the plaintiff are false or mistaken deductions from the actual facts existing. Now this,
215

Gentlemen of the Jury, is a question of fact for you. It all goes to the question of whether or not discrimination was practiced, as alleged, against the plaintiff company's mines and in favor of the alleged preferred shippers, the Berwind-White Company in the Clearfield region and Williams & Company in the Indiana region. The burden of proof to show actual discrimination is on the plaintiff. The evidence in this behalf must show by the preponderance of proof that there was actual discrimination practiced by the defendant company. The facts shown by these tables, prepared on behalf of the plaintiff and defendant respectively, you must keep in mind as well as you can from the evidence offered on the witness stand and from what has been argued therefrom by Counsel. We are not permitted to send out any of these statements or tables with you when you retire for deliberation. You will have to do the best you can on that subject from the impressions you gain from the witness box or from the testimony as given on the stand or as commented upon by the Counsel or by the Court. It would take hours to go over all these tables, and hence we do not intend to go over them item by item. The tables of percentages of unassigned cars received by the plaintiff company, according to the distribution sheets and the deductions therefrom, made by the witnesses who testified therefrom from the stand, are intended to show you that while the alleged preferred shippers did get a large number of assigned cars, either individual or fuel supply cars, that they did not get the alleged unfair percentage of unassigned cars claimed for on behalf of the plaintiff company, and which of course could only be used as the basis of this suit. In this connection, it is claimed by the plaintiff's Counsel that these percentages are not fair to the plaintiff, for the reason that some of

216 the cars, as shown by the distribution sheets, furnished to the plaintiff company are charged on successive days against the rating of that company, and you will recall that the testimony of the witnesses having charge of the distribution sheets was to the effect that as to all shippers cars standing or left over from a previous day are charged not only on the day on which delivered but on the successive days during which they stood idle and unfilled on the sidings of the several companies. The plaintiff claims that its tables are made up of only such cars as were actually filled and that there are no duplications of cars in the percentages on which its calculations are based, while the defendant company claims this method of charging against the several mines was common to all mines and hence was fair alike to all. To this plaintiff answers that from their practice of unfair distribution or from their practice of not giving cars regularly, it so disorganized their mining force so that frequently they were unable on receipt of cars to fill them promptly, due to the fact that their miners had left, and that this was simply one of the defendant's methods of discrimination leading to ultimately driving the plaintiff out of business. All of these questions are for the jury and to be decided by you as to whether or not undue and unreasonable discrimination has been practiced, as alleged by the plaintiff.

This question of discrimination or unfairness in car distribution

in comparison with other shippers, is in this case probably the first question for you to determine. The question is, whether the plaintiff, by the weight of the evidence offered, has satisfied you that during the period of the action or of any considerable portion thereof it did not get its fair distributive proportion of the unassigned cars in comparison with the Berwind-White Company in this County and in comparison with Williams & Company in Indiana County. If it was fairly treated in the matter of unassigned cars and no discrimination is shown by this testimony, then on this branch of the case there could be no recovery and hence no trebling of damages.

217 If you find there was discrimination and unfairness in car distribution by the defendant company in favor of the alleged preferred shippers, then there can be a recovery in this case in some amount and it is for the jury to determine that amount. This is wholly a question of fact for you, and the elements entering into the right to recover for discrimination will be considered later.

Now if, as I said before, you are not satisfied that discrimination was practiced, that is, a preference given to one shipper over another, yet the plaintiff claims the right to recover because of an inadequate and insufficient car supply to the plaintiff. In such case only certain damages can be recovered, but the question of the amount of damages and the methods entering into the calculations or estimates of damages given by the plaintiff are much the same. When there is a great pressure in the coal market and a consequent car shortage, the rating of coal mines tributary to the defendant company are extremely important and the railroad company must distribute its car supply with reference to the actual ratings of the mines, but in the normal periods when there is no unusual demand for car supply, mine ratings are not of so much importance. The duty of the railroad company, as a common carrier, is not the regulation of the coal supply but is to furnish cars on demand to its shippers. It is claimed by the plaintiff, and admitted I believe by the defendant, that requisitions were made at all of its mines for a car supply equal to the ratings of each mine. Am I right about that; were they up to the ratings?

Mr. LIVERIGHT: Yes.

The COURT: And the plaintiff claims that instead of receiving cars as demanded from day to day it received but a small portion of its rating during any of the period sued for. This it is claimed is a violation of the common law duty of a common carrier and much of the testimony offered here, while offered with a view to showing discrimination, has also reference and relevancy to the question whether or not a sufficient and adequate supply of cars was furnished to the plaintiff company for the conduct of its business. If the testimony satisfies you that the defendant company did not sustain its common law duty in this respect and did not furnish a sufficient and adequate supply of cars to the plaintiff and thereby plaintiff was injured, it has the right to recover at your hands the damages which it shows it sustained by reason of this failure of the defendant company to do its duty as a common carrier.

As a defense to this branch of the case, two of the general officers of the defendant company were called to show what is claimed to be a sufficient answer in law to the claim of the plaintiff; that is, while it is claimed that they have a sufficient and adequate supply of cars to meet the demands of the coal trade in ordinary times, but that the company has a right to make a pro rata distribution of its car supply, even in normal times, in disregard of the requisitions or demands of shippers. Mr. Trump, the General Superintendent of Transportation, was called, who testified that the defendant company increased its equipment from year to year in some proportionate degree to the increased tonnage demanded by the market and to be shipped by his company. He testified also to the total number of tons of productive capacity of all the mines tributary to the system of the defendant company's railroad, which he claimed to be about three times that of the actual demand of the market. From these facts it is argued that the defendant company has a right to regard that percentage of about 35 per cent. of the rated capacity of the mines to be the amount or sum total of their duty to the several individual shippers. In our judgment, these facts do not constitute a legal defense against an action of this kind. It is the duty of the common carrier to furnish shipping facilities on demand, and it is

219 not the duty of the common carrier to try to regulate the market for any product, whether it is wheat, coal, timber or any other bulky subject of freight. The business of a railroad company is transportation pure and simple, and if a bituminous coal producer offers his product to the railroad company in normal times it is the duty of the common carrier to furnish facilities for the shipment demanded. The glutting of the market is not a subject with which the railroad company had anything to do. If then in this case you are satisfied that the plaintiff company demanded cars and shipping facilities for its coal for its several mines, during the entire period, even though you are not satisfied that it was discriminated against in favor of other shippers, yet there can be a recovery if the testimony satisfied you that such demand was made in good faith by the plaintiff company as a bona fide owner of mines and producer and shipper of coal, that its demands were not complied with in furnishing the shipping facilities and that it has been injured and damaged by such refusal to furnish cars.

Now, then, Gentlemen of the Jury, if you find that there was no discrimination against the plaintiff company and that under the evidence there was a sufficient and adequate supply of cars furnished, your verdict of course would be in favor of the defendant. But if you find either that there was discrimination or that although no actual or sufficient evidence of discrimination practiced, yet that there was an inadequate and insufficient supply of cars, amounting to a violation of the common law duty of the defendant corporation as a common carrier, then there can be a recovery in favor of the plaintiff in some amount. What the plaintiff is entitled to recover in this case, generally speaking, if entitled to recover at all, is compensation for the injuries which it sustained, and in arriving at the amount of your verdict you should not be influenced by prejudice

against the railroad company nor by bias in favor of the plaintiff.

It is for you to reach a fair and conscionable verdict under
220 the evidence. The measure of damages in either event, that

is, whether you find discrimination or find that an insufficient and inadequate supply of cars was furnished, has in this case two elements: First, for coal not shipped, which it alleges it could have shipped had it been supplied with cars according to the duty of the defendant company. For coal not shipped the measure of damages is the difference between the cost of mining and delivering the coal on the railroad cars, plus the royalty, and the fair average selling price of this particular coal at the mine between the dates from October, 1905, to the end of April, 1907, except for the four months in 1906 when the mines were not working, on all coal which you may find from the evidence offered the plaintiff could have reasonably been able to mine and ship from all of its mines except for the neglect or refusal of the defendant company to furnish it with cars. This measure of damages as a proposition of law, has been laid down in this class of cases as the true estimate of damages on which juries are to base their verdicts. As a measure of damages it has been sustained by our Appellate Courts and must be followed by this Court. On this theory of damages certain tables have been prepared and offered in evidence, from which it has been argued to you the claims of the plaintiff company has some guide from which to estimate the damages sustained. These tables or estimates are only for the convenience of Counsel and the Court and cannot be taken out by you and are not to be considered by you as the actual damages sustained. The proofs must satisfy you that actual damages in dollars and cents, and the amount thereof, has been sustained by the plaintiff, and these tables of themselves do not prove anything, but must be accepted as mere calculations or deductions mathematically made up by those interested in maintaining their theory of the elements of recovery. In addition to the loss of profits on coal not shipped, the plaintiff claims the right to recover for losses sustained in the increased cost of production of the coal actually
221 shipped from each of these mines, and a table has been prepared and commented upon as a convenience of Counsel, going to show the elements of damages entering into that phase of this case.

Now, both of these elements of damages, that is, loss of profits on coal not shipped and loss due to increased cost of mining on coal actually shipped, if due either to discrimination or lack of car facilities furnished, are proper elements entering into your estimate of damages and on which you must base a verdict. Now, as an aid in estimating the damages sustained on coal not shipped, extensive tables have been prepared and used by the Court and Counsel, with a view of aiding in estimating damages. The first tables offered were those with respect to the blue print and another table with respect to the Williams & Company mine are made on which you could estimate the damages in case you find there was an inadequate and insufficient car supply in single damages. But the vice of the table was that it claimed the right to recover on the full output capacity

of the mines and not upon the demands for cars and, in my judgment, the plaintiff, although it had an output capacity for these mines of say 15 cars a day, if it only demanded 5 cars per day, it couldn't recover in an action more than for 5 cars. So that the damages claimed in these tables were defective and had that vice in them. I will not attempt to go over all of these tables. You will recall the testimony on behalf of the plaintiff to show the prices on which these tables were based at \$1.25 a ton. It claims the right to recover \$1.25 a ton for coal not shipped from these mines. Now you will recall the testimony on that subject and how that was arrived at. It is claimed on behalf of the defendant that that is not a proper estimate of the price per ton. Then the theoretical cost of mining, a great deal of testimony was taken on that subject and it is disputed that that theoretical cost of mining is a proper estimate on which you should base your verdict. All that is for you, Gentlemen of the Jury.

222

Mr. COLE: That is not disputed by any evidence.

The COURT: No, but it is claimed that the theoretical cost of 89 cents, for instance, and 95 cents, is not a proper estimate of the cost and they compare that with the actual cost and say that it is impossible for a jury to arrive at a conclusion that when it actually cost even on the small output that much money per ton, it should have cost such a small amount per ton if they had had the tonnage which they asked for. Now then, as I said before, these tables some of them show a large tonnage loss claimed, particularly the blue print table, and put the damages at a very high figure, mentioned by one of the witnesses on the stand and also commented somewhat by Counsel, but these tables must not be accepted as proving any facts contained in them. They are only estimates of damages from what is alleged to be the facts proven in the case. Now on behalf of the defendant it is claimed that these are not fair estimates of damages in many ways. First, that it is a physical impossibility to expect that any of these mines could have run day by day to their full capacity under any and all circumstances. Second, it is claimed that as to mine No. 2 there was not the haulage equipment in shape to have such an output as 600 tons per day. And as to mine No. 3 it is claimed and some evidence is offered going to show there was no such acreage of coal in place at that mine warranting a recovery of such a tonnage output. Some testimony was also offered as to No. 4 with reference to the tonnage capacity and acreage, and also as to Nos. 5 and 6. The theoretical cost per ton to mine the coal from each of these mines is also attacked by the defendant and a comparison is called to your attention by Counsel for defendant of the actual cost per ton from each of said mines. Now then, Gentlemen of the Jury, you must keep in mind all of these facts

223

and circumstances testified to by witnesses on both sides and draw your own conclusions as to whether this theoretical estimate of the cost of mining can be depended upon as the price element of damages on which you could base a verdict. The difficulties, delays, strikes or labor troubles, faults or troubles in the mine proper, are to be taken into consideration by you in measuring what you think the damages sustained should be liquidated.

Now, as I said before, another element of damages claimed in this case and which we have said to you is a proper element for you to consider, is loss of profits on coal actually mined and a table was prepared on that subject.

Mr. COLE: You made a mistake in the use of the word profits.

The COURT: I don't mean loss of profits, but loss on coal actually shipped by reason of increased cost of mining. Now on this branch of the case a table was prepared and offered in evidence and commented on by Counsel, although I think he said in his argument to the jury or he admitted there were estimates in it which increased the amount over what he would now claim.

Mr. LIVERIGHT: On the basis of the discrimination.

The COURT: Now then, both of these elements of damages, that is, the loss it sustained by reason of the coal which it could not ship owing to the lack of car facilities, and the loss on coal which it did ship by reason of increased cost of mining, are incident alike to both branches claimed for in this case, that is, for discrimination on the one hand and for inadequate and insufficient car supply on the other. You cannot, however, as you can readily see, allow for both.

If you find discrimination was practiced in favor of Berwind-White Coal Mining Company and Williams & Company, the
224 method of estimating damages based on coal not shipped could not be made on either the physical capacity or output capacity of plaintiff's mines just as made up by the tables, for the reason that the plaintiff is not entitled to recover for all the cars which the favored shippers got in excess of their just deserts, but only to their pro rata share of such excess of cars. The measure of plaintiff's damages as single damages, in that event, would be based on what the plaintiff could and would have shipped, in addition to what it did mine and ship, if given its fair pro rata share of the unassigned cars which its competitors received in excess of its fair percentage, day by day or month by month, as you may find such competitors were given the excess of percentages. In considering the damages, therefore, in case you find on discrimination, you must first ascertain what would have been, under all the circumstances testified to, a fair rating of the plaintiff's mines in both regions. Second, if after having such fair rating a comparison with the alleged preferred shippers would entitle it to an increased number of cars and what that increased number of cars would be, and if the evidence at the same time shows that the preferred shipper received, day by day and month by month throughout the period of the action, an excess over its proper pro rata share, the plaintiff would be entitled to recover at your hands a verdict for what you may find its fair share of such excess of cars amounted to in tons, estimated just as we have laid down the rule with respect to the method of calculating. Now then, if you allow for discrimination, then you may disregard all question as to inadequacy or insufficiency of car supply, because you cannot allow for both. For discrimination, after you have made an estimate of the amount of damages and found a definite sum as compensation for the injuries which it sustained, that would be single damages, and if you find that there was discrimination, as claimed by the plaintiff's Counsel then you

225 can go to the question as to whether there shall be treble damages under the Act of 1883. The question of treble damages is one we believe the jury have a right to pass on. If you find discrimination, therefore, and you arrive at or estimate the amount of single damages which you believe the plaintiff has sustained by reason of such undue and unreasonable discriminatory acts practiced against it, it is for you to say whether or not that amount should be trebled, that is, multiplied by three. There are circumstances of injury where the plaintiff should only be allowed to recover single damages even in case of discrimination, while there are undoubtedly other cases where the actual injury should be trebled, and this we believe is for the jury. To treble the damages which you believe the plaintiff has sustained, the testimony should convince you that the action of the officers of the defendant company offending was of a serious and injurious nature to the plaintiff company. There may be cases, and it is for you to say whether this is one, where the discrimination practiced may have arisen from mistake or by inadvertence where doubtless single damages would be sufficient compensation. But if through a period of months or years you find what appears to have been an intended or studied effort to injure the business of the plaintiff, or find that the defendant company's officers disregarded all notice of alleged unfair treatment and appeals for fair distribution, then it is entirely for the jury to say whether such conduct of the defendant company's officers authorizes you to treble the damages. If you find there was no discrimination practiced but that the plaintiff is entitled to recover for inadequate and insufficient car supply, you allow only single damages in any event. While if you find there was discrimination practiced, then you find the single damages and may, if the circumstances warrant it, treble that amount and bring in a verdict accordingly. In that case you say you find the plaintiff was discriminated against and should name both the single damages and treble damages sustained.

226 Counsel have submitted the following points:

Plaintiff's Points.

"1. The defendant company is a common carrier, and as such it is its duty to treat all shippers of bituminous coal, whether the quantity produced for shipment be large or small, with equality, and to give to each the same pro rata of cars and other facilities for transportation of coal to market that it gives to any other shippers from the same region under substantially the same conditions."

Affirmed.

"2. That if the defendant company fixes output capacity and commercial performance combined, of the several mines along its lines, as the basis for mine ratings and distribution of cars to the mines, it must not only adopt the same method for all mines but must also give to all operators on its lines and branches equal pro rata facilities for having coal transported and for increasing the output and enlarging the development of their mines; and if it has not done so and has made any undue or unreasonable discrimina-

tion either in its method of rating, or in its facilities for transportation of its product, said conduct would be undue and unreasonable discrimination against the operator thereby injured."

Affirmed.

Assignment of Error No. 3.

["3. If the jury find that the ratings of the Plaintiff's mines by defendant were unlawful and discriminatory, they should then find what said ratings should have been under the rule promulgated by the defendant, had no unlawful discrimination been practiced against the plaintiff in the matter of facilities for making commercial shipments. The rating so found to be a proper and lawful one would be the one on which plaintiff was entitled to pro rate in the distribution of unassigned cars."]

Affirmed.

227

Assignment of Error No. 4.

["4. If the jury find that the ratings or any of them, given plaintiff by defendant were an undue and unreasonable discrimination, and that thereby plaintiff was discriminated against in the distribution of unassigned cars, it would be entitled to recover such damages, if any, as it sustained by reason of having distribution made to it upon the basis of the lower rating."]

Affirmed.

Assignment of Error No. 5.

["5. If the jury finds from the evidence that the defendant company either failed or refused to give daily to the plaintiff its pro rata share of cars for distribution, then and on all such days the distribution was unjust and illegal and unduly and unreasonably discriminatory against the plaintiff, and if the plaintiff suffered damages therefrom, it is entitled to recover such compensation as the jury may find from the evidence would be fair and just."]

Affirmed.

Assignment of Error No. 6.

["6. If the jury finds from the evidence that the defendant failed to furnish to the plaintiff its pro rata share or percentage of the cars as compared with the percentage furnished the Glenwood mines or those of the Berwind-White Coal Mining Co., or Standard # 7, or either, and the jury further finds that the plaintiff was thereby prevented from increasing its output or from shipping the coal that it could or would have shipped, that would constitute an undue and unreasonable discrimination, for which the plaintiff may recover such damages as the evidence shows it suffered."]

Affirmed.

Assignment of Error No. 7.

["7. The testimony showing that under a rule of defendant in effect in 1906, cars were counted against plaintiff once for each day

each car remained empty on the plaintiff's sidings, if the jury find from the evidence those counted stood empty, not as a result of any act of plaintiff's or any omission of plaintiff's, nor of any business custom or practice of plaintiff's, but by reason of undue and unreasonable discrimination against plaintiff by defendant in car distribution, whereby its working force became disorganized and scattered and it was not possible promptly to load said car or cars, such car or cars, if any, that stood empty on plaintiff's sidings as a consequence of defendant's discrimination and from no other cause, should not be counted against plaintiff more than once each."]

Affirmed.

Assignment of Error No. 8.

["8. The defendant was required by law from day to day to give to the plaintiff the same pro rata or percentage of unassigned cars that it gave to its competitors, the Berwind and the Williams companies. If it failed so to do, such failure worked an unjust and unreasonable discrimination against plaintiff, and plaintiff will be entitled to recover such damages as it sustained thereby."]

Affirmed.

Assignment of Error No. 9.

["9. The measure of plaintiff's damages would be the reasonable profit upon the coal it could and would reasonably have shipped, in addition to what it did mine and ship, if given the same pro rata of unassigned cars as its said competitors were given, on days that it was not given such percentage."]

That is refused as stated, for the reason that it leaves out of consideration the rights of other shippers, and the rule alternatively presented by Counsel is affirmed, which reads as follows:

"The measure of plaintiff's damages would be its reasonable profit upon the amount of coal plaintiff could and would reasonably have shipped in addition to what it did mine and ship if given the same pro rata of unassigned cars as its said competitors were given on days that it was not given such percentage: provided, that thereby no other shipper on the same division would have received less than the general average of unassigned cars for distribution on that division. If, to have given the plaintiff the same percentage of unassigned cars as its competitors named in the case, would have resulted in according more than the general average for distribution out of the general pool of unassigned cars, the recovery by plaintiff should be limited to its distributive share in such pool from day to day upon such a mine rating as the jury find plaintiff should have had under all the evidence."]

Affirmed.

"10. If the plaintiff suffered damage upon the coal which it did actually mine and ship, by reason of the wrongful acts of the defendant in restricting its output by undue and unreasonable discrimination in ratings or car distribution whereby the cost of producing the coal it shipped was increased, plaintiff would also have the right to recover such damages."

Affirmed.

"11. The measure of such damage would be the difference between what it actually cost to produce the coal shipped, and what it would have been produced for except for undue and unreasonable discrimination by the defendant."

Affirmed.

"12. If the jury find in favor of the plaintiff on the question of undue and unreasonable discrimination against it by the defendant, they should first liquidate the actual damages suffered by the plaintiff under the evidence and instructions of the Court. They may then multiply said damages by three under the provisions of the Act of 1883, permitting the recovery of treble the actual damages suffered."

230 That is affirmed, although you must keep in mind the conditions under which it is trebled as given in my general charge.

"13. If the jury fail to find from the evidence and the instructions of the Court that the defendant did unduly and unreasonably discriminate against the plaintiff, then still the plaintiff may recover damages, if any were sustained, if the defendant without legal and proper excuse failed or refused, upon requisition in good faith made, to furnish to the plaintiff an adequate and sufficient supply of cars to load and ship plaintiff's product that it was able to produce and sought to have shipped, and for which it had a market."

Affirmed.

"14. In measuring the damages, if any, sustained by the plaintiff for failure of defendant to furnish it an adequate and sufficient supply of cars, loss of profits upon coal that would have been mined and shipped, and loss sustained through excessive cost of production of coal that was mined and shipped, are recoverable. Treble damages are not recoverable therefor."

Affirmed.

"15. The plaintiff cannot recover damages both for discrimination and for failure to furnish it an adequate car supply. The recovery, if any there be, must be for one or the other."

Affirmed.

231

History of the Case.

In October, 1905, and shortly thereafter, the plaintiff acquired certain mines in the Clearfield bituminous coal region, Falcon Nos. 2, 3 and 4, on the Tyrone Division, and Nos. 5 and 6, on the Cresson (Cambria and Clearfield) Division. Its competitors and nearest neighbors on the former were the Berwind-White Coal Mining Company, and on the latter D. E. Williams & Co. Berwind owned five mines and controlled a sixth; Williams operated eight mines. All the mines were on the Pennsylvania Railroad.

Plaintiff brought suit to recover damages (1) because defendant had failed to furnish an adequate car supply; (2) because defendant had discriminated against it in the matter of car service and supply in favor of its competitors.

The defendant had in force a system of distribution based in part on ratings it fixed for the various mines. Under said system "as-

signed" cars were allotted to operators claimed to have the right to them, said cars constituting 72 per cent. of the entire coal car equipment. The remaining 28 per cent. of the equipment, designated as "unassigned," was distributable among all the operators, including those who were favored with assigned cars.

When there was a car shortage among the operators seeking "unassigned cars," they were supposed to be delivered on the basis of the rating accorded them, founded upon a combination of physical capacity and commercial performance. The more an operator was favored with cars, the better the rating he could get, and the larger the car supply he would consequently receive in periods of shortage. Conversely, the poorer his car supply, the poorer his rating, and the more readily he was submerged.

232 Between 1905 and 1907, defendant gave plaintiff's competitors many times their proportionate share of cars. For instance, if there was a general distribution equivalent to 45 3/10 per cent. of the rated capacities of the mines, Berwind would get 400 per cent.; Williams would have his mine siding replete to overflowing, with receipts several hundred per cent. in excess of his ability to load coal, and of his correct percentage, and the Falcon mines would receive practically nothing. The percentage would vary, but always the favored operators got many times their proportionate share, at the expense of plaintiff. Defendant made no pretense to grant plaintiff the same proportion of the unassigned car equipment that it allotted Berwind and Williams. It was inevitable that when the favored ones received far beyond their share, the plaintiff must receive far under its share.

On the Tyrone Division plaintiff's ratings were arbitrarily kept down, having been inexplicably reduced immediately after plaintiff bought its mines. The disproportionate car supply served to hold these ratings to a minimum. At the same time the Berwind mines were carried on the railroad company's sheets at approximately one-seventh beyond their capacity, and served with equipment to much greater excess.

The Williams mines were carried on the railroad company's sheets at a figure 250 per cent. beyond their average daily shipments for the entire period of the action, and at least 20 per cent. beyond their maximum physical productive ability.

For days at a time no cars at all were received at plaintiff's mines, or many of them; and at the very same time the competitors, who also enjoyed the benefit of the "assigned" equipment, received a share and a proportion beyond all reason, in the "unassigned" cars.

233 The defendant presented elaborate answers in the way of compilations from its sheets, made up in its own offices by its own expert accountants. It was demonstrated that these sheets were not reliable. Cars that the Berwind management testified they had actually shipped were not charged on the sheets. Cars that actual count showed Williams to have gotten were nowhere on the sheets. Tables made up by the accountants were offered to show division, mine and group car receipts. All of them were based on the erroneous ratings given plaintiff's competitors.

In addition they were proven untrustworthy by an important statement contained in a letter from the defendant's Superintendent of Transportation, which showed from one in authority that in specific months to which he referred the "unassigned" car distribution was 28 per cent. greater than the accountant's tables represented it to be on the Tyrone Division, with the discrepancy not so glaring on the Cresson Division.

All the questions of fact involved in the litigation were submitted to the jury under appropriate instructions. The Court charged that equal, ratable car service was what plaintiff was entitled to, and that if the jury found that plaintiff had not been granted equality of service, and the same ratable treatment as its competitors, a verdict might be returned holding defendant responsible for discrimination. He also charged that if plaintiff had been discriminated against, and had thereby been pecuniarily injured, it might recover damages. The amount of the recovery, under the instructions, was limited to such sum as plaintiff would have made had he enjoyed the same proportionate supply of cars as was granted all the other operators on the divisions as a whole, including the favored competitors.

The jury found that plaintiff had been discriminated against, assessed its damages at \$41,481.00, and then trebled the verdict.

234 CLARK BROTHERS COAL MINING CO.
VS.
PENNSYLVANIA RAILROAD COMPANY.

STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the additional portions of the record as required by præcipe filed by Defendant in Error, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 17th day of December, A. D. 1913.

[Seal of the Supreme Court of Pennsylvania, Eastern District,
1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

[Endorsed:] File No. 23,925. Supreme Court U. S., October Term, 1913. Term No. 290. The Pennsylvania Railroad Co., Pl'ff in Error, vs. Clark Brothers Coal Mining Company. Additional record ordered to stand as return to writ of certiorari. Filed March 23, 1914.

Endorsed on cover: File No. 23,925. Pennsylvania Supreme Court. Term No. 290. The Pennsylvania Railroad Company, plaintiff in error, vs. Clark Brothers Coal Mining Company. Filed October 30th, 1913. File No. 23,925.

5
Office Supreme Court, U. S.

FILED

MAR 16 1914

JAMES D. MAHER

CLERK

**IN THE SUPREME COURT OF THE
UNITED STATES.**

NO. ~~100~~ OCTOBER TERM, 1913.

290

**THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR.**

vs.

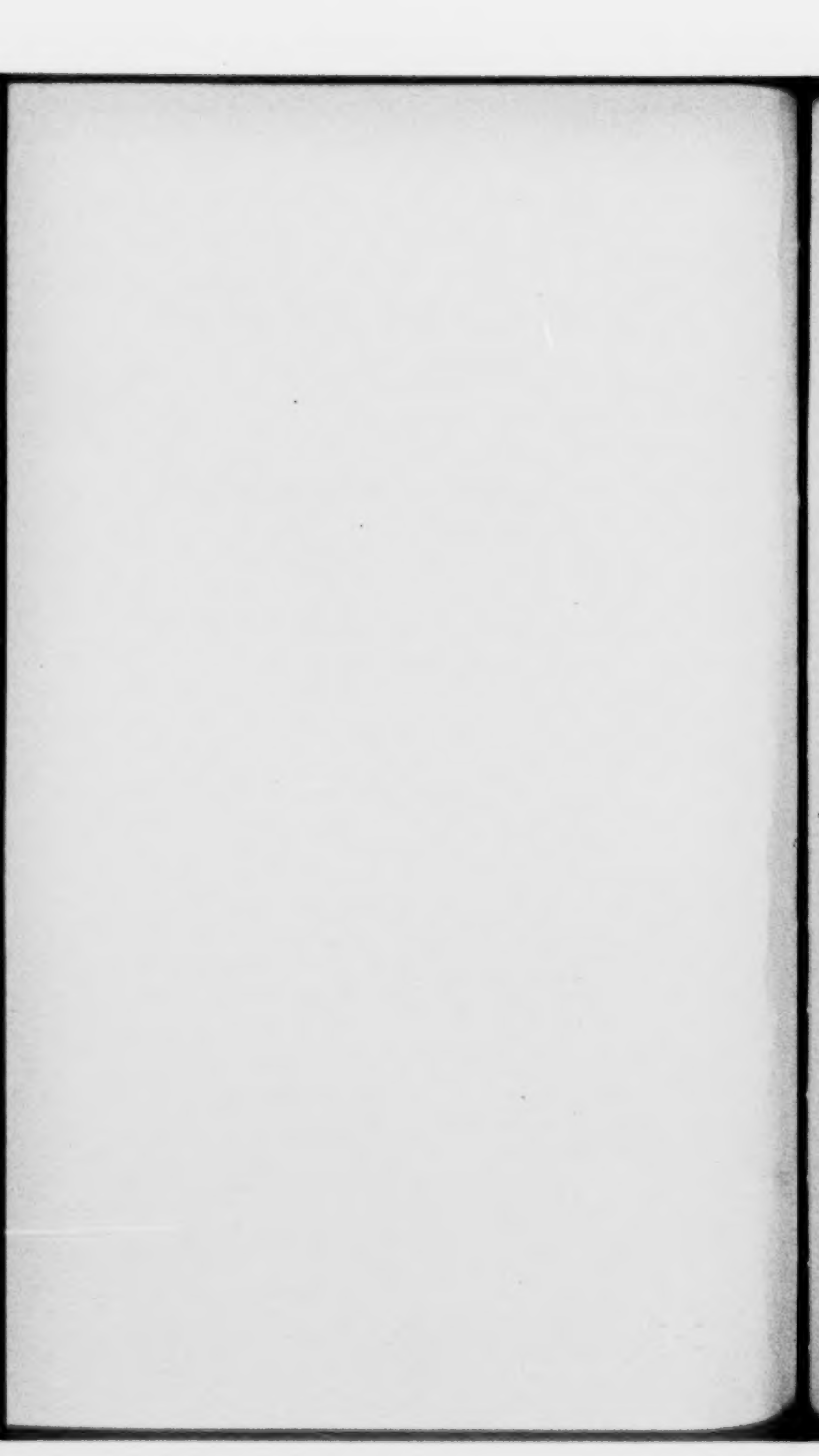
**CLARK BROTHERS COAL MINING COMPANY
DEFENDANT IN ERROR**

**PETITION ALLEGING DIMINUTION OF THE
RECORD AND MOTION FOR WRIT
OF CERTIORARI.**

A. M. LIVERIGHT,

A. L. COLE,

Counsel for Deft. in Error.



**IN THE SUPREME COURT OF THE
UNITED STATES.**

NO. 774, OCTOBER TERM, 1913.

**THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR.**

VS.

**CLARK BROTHERS COAL MINING COMPANY
DEFENDANT IN ERROR**

**PETITION ALLEGING DIMINUTION OF THE
RECORD AND MOTION FOR WRIT
OF CERTIORARI.**

A. M. LIVERIGHT,

A. L. COLE,

Counsel for Deft. in Error.

IN THE SUPREME COURT OF THE
UNITED STATES

OF THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA
V. THE UNITED STATES

ON PETITION FOR WRIT OF HABEAS CORPUS

FILED FOR RECORD

THE DISTRICT OF COLUMBIA
V. THE UNITED STATES

IN TESTIMONY WHEREOF

CLERK OF THE COURT

**IN THE SUPREME COURT OF THE UNITED
STATES.**

**The Pennsylvania Rail-
road Company plain-
tiff in error
versus**

**The Clark Bros Coal Min-
ing Company, defend-
ants in error.**

No. 774 October

Term 1913.

Comes now the said defendant in error by A. M. Liveright and A. L. Cole, its counsel and suggests diminution of record in this case, to-wit: That certain evidence of record in the Supreme Court of Pennsylvania is omitted from the transcript on file in this court, that said evidence is indicated as follows:

(1) Excerpt from the testimony of J. O. Clark, pages 50a, 51a, 52a, and 53a in Exhibit "A" attached to the plaintiff's praecipe, to the words "Tuesday, November 19, 1912."

Excerpt from the testimony of J. O. Clark in said Exhibit beginning at page 59a, with the sentence "You said in answer to a question by Mr. Gowen that you had a quarrel with their system of rating." continuing over pages 59a, 60a, 61a, 62a, 63a, 64a, 65a, 66a and 67a, to the words "By Mr. Gowen."

(2) Excerpt from testimony of Jacob H. Miller, pages 81a to 111a inclusive in said Exhibit.

(3) Excerpt from the testimony of W. R. Cameron, pages 113a to 136a of said Exhibit, ending with the words "Well I judge about 200 tons."

(4) Testimony of E. B. Chase page 137a to 148a inclusive in said Exhibit.

(5) The following excerpt from the testimony of J. A. Jardene page 154a of said Exhibit:

"Q. State whether or not this period of action, October 1905 to May 1907 constituted a normal time in the coal business?

A. Yes, it was a normal time".

(6) Excerpt from the testimony of A. C. Bowser page 177a, to the first question at the top of 180a.

Also page 181a and page 182a to the question "Was the mine physically capable of producing practically or substantially as much coal in October 1905 as on the 18th of April 1907, a 11 of said testimony being in Exhibit "A".

(7) Excerpts from the testimony of Joseph H. Dorn, in said Exhibit, beginning with the words "By Mr. Cole at page 191a and continuing to testimony of H. A. Gresmer on page 194a.

(8) Excerpt from the testimony of C. W. Proctor in said Exhibit pages 198a and 199a, to beginning of cross examination.

(9) Testimony of P. E. Womelsdorf, pages 203a, 204a, and 205a of said exhibit.

(10) Excerpt from the testimony of E. C. Howe in

said Exhibit, beginning at page 215a with the question "Up to that time what has been your own estimate of the output capacity of No. 5"? Continuing over pages 215a, 216a, and 217a, to the answer "That is all."

(11) Excerpt from the testimony of John B. Salsgiver in said Exhibit pages 220a, 221a, and 222a, to the answer "Yes, we did."

(12) Excerpt from the testimony of E. B. Koozer in said Exhibit, pages 227a and 228a to the words "1000 tons per foot per acre."

(13) Excerpt from the testimony of Thomas Bryson in said Exhibit from page 259a to 278a inclusive, ending with "Yes, quite frequently these things would happen."

(14) Excerpt from the testimony of A. M. Riddle in said Exhibit, beginning at page 283a and concluding on page 293a with the following "I would say about 18 anyhow."

Also testimony of A. M. Riddle on page 295a beginning with "By Mr. Gowen", and concluding on pages 296a, with "to the best of my knowledge."

(15) Testimony of W. J. Trevesick in said Exhibit, pages 299a to 301a inclusive.

(16) Testimony of J. O. Clark in said exhibit pages 310a to 312a inclusive.

(17) Excerpt from the testimony of J. R. Rate in said Exhibit, pages 312a to 323a concluding with the words "By Mr. O'Laughlin."

Also testimony of same witness from page 326a to page 331a concluding with the words "Falcon No. 4 41-1.10 per cent."

(18) Plaintiff's Exhibit No. 29 pages 355a to 363a of said exhibit.

Plaintiff's Exhibit No. 31 at page 364a of same.

Plaintiff's Exhibit No. 32 at page 365a of same.

Plaintiff's Exhibit No. 33 at page 366a of same.

(19.) Testimony of Jacob H. Miller page 367a and page 368a of said exhibit.

(20) Plaintiff's Exhibit No. 38 at page 333a of said Exhibit.

Plaintiff's Exhibit No. 39 at page 385a of same.

Plaintiff's Exhibit No. 40 at page 387 of same.

Plaintiff's Exhibit No. 41 at page 388a of same.

(21) Excerpt from defendant's Exhibit No. 7, in said Exhibit "A" beginning with paragraph starting "The complainant alleges that the system" at top of page 491a and concluding with the words "Must have accrued" on the same page.

(22) Excerpt from the testimony of M. Trump in the same Exhibit "A" beginning with "we don't care what led up to the rule" on page 396a, to words "No sir" on page 398a.

(23) Excerpt from the testimony of G. W. Creighton in the same Exhibit, beginning with the words at page 591a "Now the times that is covered by this

action were ordinary times in the business," continuing to page 593a at the words "No-sir, I did not."

Alson testimony of same witness beginning at page 594a with the words "Did you follow the percentage distribution" to the words, "660-4.10 per cent of the unassigned cars" at the foot of page 595a.

(24) Excerpt from the testimony of M. Trump page 573a of same Exhibit, beginning with "You knew that Clark's were complaining during the whole period of this action because they didn't get cars enough didn't you," concluding with the words "I can't say that in the abstract sir."

(25) Excerpt from the testimony of G. E. Oler in the same Exhibit beginning at top of page 683a and continuing to and including the words "I will say every third day then" on page 690a.

Excerpt from the testimony of same witness, beginning with the last question at foot of page 693a and continuing to the words "Yes, if you want me to say that, certainly we did" on page 698a.

Excerpt from the testimony of the same witness beginning at page 704a with the question "Now get your sheets for March 1907. What is the distribution on March 7." and continuing to and including the words "They would." In other words if the distribution sheet would be wrong the tables would be wrong" at page 718a.

Excerpt from the testimony of same witness beginning at page 723a with "Do you have those rating figures at hand" to the words, "No-sir on page 724a.

(26) Copy of Defendant's Exhibit No. 27 at page

744a of same Exhibit. Copy of defendant's Exhibit No. 33 at page 748a of same Exhibit.

(27) Excerpt from defendant's Exhibit No. 7, in said Exhibit "A" beginning with the words "By combining the Commercial capacity at line 3 page 469a and concluding with the words "distribution of equipment" at the end of the same paragraph.

(28) Excerpt from the testimony of P. E. Womelsdorf in said Exhibit beginning with "Have you had occasion in past years to make an examination of the Urey Ridge Coal Company's operations?" on page 765a to the conclusion of his testimony at the top of page 771a.

(29) Plaintiff's motion to strike off demurrer, page 803a.

(30) Motion to amend statement as to amount claimed, page 806a.

(31) The charge of the Court, pages 15 to 39 inclusive in Exhibit "B" attached to the praecipe of the plaintiff in error.

(32) Plaintiff's points, pages 39 to 43 inclusive in said Exhibit "B" attached to praecipe of the plaintiff in error.

(33) History of the case at pages 3, 4 and 5 of Exhibit "C" hereto attached and made a part of the praecipe of the defendant in error.

That by inadvertence on the part of the defendants in error's attorneys and by a misunderstanding of the rules of this court they were under the impression

that they had ninety days from the time of service of the plaintiffs in errors praecipe on them, designating the part of the record to be sent up within which to file their counter praecipe, believing that the proceeding was under rule 9 section 10, and thereby allowed the ten days to expire in which they should have filed their counter praecipe under section 1 of rule 8 of the Rules of Practice of this court.

That upon discovering their mistake the defendants in error applied to a Justice of the Supreme Court of Pennsylvania, for an enlargement of the time in which to file their counter praecipe, which application was granted by the Honorable John P. Elkin, Justice of said Court as appears by schedule hereto attached, setting forth the order of said justice.

That defendants in error's attorneys are now advised that said order is not effective to make the transcript so returned a part of the record of this court.

That the parts of the record so omitted are material and absolutely essential to the proper understanding and decision of this cause.

WHEREFORE, the said defendant in error moves the court under rule 14 to award a writ of certiorari to be issued and directed to the Judges of the Supreme Court of Pennsylvania, commanding them that searching the record and proceedings in said cause they forthwith certify to this court those parts of said record so omitted as aforesaid.

A. M. LIVERIGHT,
A. L. COLE,

CLEARFIELD COUNTY, ss.

Personally came before me the subscriber, A. L. Cole and A. M. Liveright, attorneys for the defendant in error, who being duly sworn, say that the facts set forth in the foregoing motion are true.

Sworn and subscribed

this day of March 1914.

EXHIBIT "A"

**IN THE SUPREME COURT OF PENNSYLVANIA,
EASTERN DISTRICT**

Clark Bros. Coal Mining
Company

vs.

Pennsylvania Railroad
Company

Appellant.

January Term, 1913.

No. 81.

To the Honorable John P. Elkin, Justice of the Supreme Court of Pennsylvania.

15th November, 1913, come A. L. Cole and A. M. Liveright, Attorneys for the Clark Bros. Coal Mining company, defendant in error in the above stated case, and respectfully aver that the plaintiff in error, the Pennsylvania Railroad company, on September 23, 1913 served a copy of the praecipe directed to the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania, indicating the portions of the record it wanted incorporated in the transcript of the record

upon writ of error; that it was impracticable within 10 days thereafter to prepare and lodge with the Prothonotary of the Supreme Court of Pennsylvania the counter praecipe of the defendant in error; that by inadvertance, Counsel for the defendant in error failed within 10 days of service upon them of the praecipe of the plaintiff in error, to obtain an order from the Supreme Court of Pennsylvania enlarging the time for them to file their counter praecipe.

Petitioners aver that it is provided by Section 1 of Rule 10 of the United States Supreme Court that the time for filing such counter praecipe may be enlarged by the Judge of the Court whose decision is made the subject of review, or by a Justice of the United States Supreme Court.

Petitioners further aver that it is important for a proper consideration of the case upon review by the United States Supreme Court that additional portions of the record be incorporated in the transcript of record to be submitted to the Appellate Court.

They therefore respectfully pray your Honor now to make an order enlarging the time for filing their praecipe until the 6th day of December, 1913.

And they will ever pray.

(Signed).

A. M. LIVERIGHT,
A. L. COLE.

State of Pennsylvania

ss.

County of Clearfield.

A. M. Liveright, one of the petitioners being duly sworn according to law, deposes and says that the matters in the foregoing petition averred are true and correct to the best of his knowledge, information and belief.

(Signed) A. M. LIVERIGHT.

Subscribed and sworn to before me this 15th day of November, 1913.

JAMES K. HORTON,
Notary Public.

EXHIBIT "B".

ORDER OF COURT

day of November, 1913, the foregoing petition of A. L. Cole and A. M. Liveright, Attorneys for the Clark Bros. Coal Mining Company, presented, read and considered, and thereupon it is ordered that the time for filing with the Prothonotary of the Supreme Court of Pennsylvania, the praecipe of said named defendant in error, indicating the additional portions of the record desired by it to be incorporated into the transcript of the record to be filed in the United States Supreme Court, be enlarged to December 6, 1913; and it is further ordered that the additional portions of the record that may be designated by the defendant in error pursuant to leave hereby granted shall be transmitted to the United States Supreme Court as part of the transcript of the record and be therein incorporated.

(Signed). JOHN P. ELKIN.

No. 290.

OCTOBER TERM, 1914.

**IN THE
Supreme Court of the United States.**

Office Supreme Court, U.

FILED

MAR 3 1915

**JAMES D. MAHER
CLERK**

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

CLARK BROTHERS COAL MINING COMPANY.

**IN ERROR TO THE SUPREME COURT OF THE STATE
OF PENNSYLVANIA.**

BRIEF OF PLAINTIFF IN ERROR.

**P. D. McKENNEY,
FRANCIS L. GOWEN,
JOHN G. JOHNSON,**
For Plaintiff in Error.

SUBJECT INDEX.

	PAGE
Statement of the Case.....	1
Specifications of Error.....	5
Argument.....	9
Court without Jurisdiction to Entertain Action.....	9
Cars for Coal Sold f. o. b. Mines Vehicles of Interstate Transportation....	16
Adequacy of Ratings of Defendant in Error's Mines Erroneously Submitted to Jury.....	20
Award of Interstate Commerce Commission a Bar.....	29
Merits of Claim.....	45

LIST OF CASES REFERRED TO.

Hillsdale Coal & Coke Company vs. Pennsylvania Railroad Company, 19 I. C. C. Rep., 356.....	40
Illinois Central Railroad Company, Interstate Commerce Commission vs., 215 U. S., 452.....	12
Interstate Commerce Commission vs. Illinois Central Railroad Company, 215 U. S., 452.....	12
Joyne vs. Pennsylvania Railroad Company, 17 I. C. C. Rep., 351.....	39-41
Morrisdale Coal Company vs. Pennsylvania Railroad Company, 176 Fed. Rep., 748; 230 U. S., 304.....	42
Penn Refining Company vs. Western New York & Pennsylvania Railway Company, 137 Fed. Rep., 343.....	36
Pennsylvania Railroad Company, Hillsdale Coal & Coke Company vs., 19 I. C. C. Rep., 356.....	40
Pennsylvania Railroad Company, Joyne vs., 17 I. C. C. Rep., 351.....	39-41
Pennsylvania Railroad Company, Morrisdale Coal Company vs., 176 Fed. Rep., 748; 230 U. S., 304.....	42
Pennsylvania Railroad Company, Puritan Coal Mining Company vs., 237 Pa. State Rep., 420.....	12
Puritan Coal Mining Company vs. Pennsylvania Railroad Company, 237 Pa. State Rep., 420.....	12
Western New York & Pennsylvania Railway Company, Penn Refining Company vs., 137 Fed. Rep., 343.....	26

In the Supreme Court of the United States.

OCTOBER TERM, 1914. No. 290.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Clark Brothers Coal Mining Company.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

STATEMENT OF THE CASE.

The defendant in error, the plaintiff below, during the period of the action was a shipper of bituminous coal over the lines of the Pennsylvania Railroad Company, the plaintiff in error. The action was brought to recover damages because of the alleged failure of the plaintiff in error to deliver to the defendant in error (a.) all the cars which it claimed it could have used for shipments from its mines, and (b.) the proportionate number of the cars available for distribution which the defendant in error alleged it would have received if a proper allotment and distribution of these had been made.

Upon the trial both causes of action were relied upon and pressed and the case was submitted to the jury with instructions that they could award damages upon either ground, but not upon both.

The jury found for the defendant in error upon the second ground above referred to, viz., that of discrimination, and as the defendant in error had claimed treble damages under a statute of the State of Pennsylvania which conferred the right to treble damages in cases of discrimination by common carriers in the distribution of their equipment, the amount of the verdict rendered was for three-fold the amount of injury which the jury found the defendant in error had sustained.

The evidence established that the plaintiff in error was engaged in interstate commerce or transportation, that the bituminous coal transported by it was transported from the mines on its lines all of which were located in the State of Pennsylvania to points both within and without that State, and that in making distribution of its coal cars among the shippers of coal, but one distribution was made, the cars delivered being available at the option of the shippers for shipments to points either within or without the State of Pennsylvania. (Transcript of Record, page 63.)

It further appeared that the defendant in error shipped to points both within and without the State, and that the additional shipments which it would have made had additional cars been available would have been so made. It claimed, however, that the bulk of the additional shipments which it would have made to points outside the State would have been sold by it to purchasers thereof at its mines, and it consequently contended that the cars which would have been used for the transportation of these shipments should not be regarded as cars for interstate carriage or transportation.

The plaintiff in error contended that in making distribution of its cars it was subject to the provisions of the Interstate Commerce Act, and to these alone, and that consequently actions based upon alleged discrimination in the distribution thereof were not cognizable in State Courts,

but only in the Federal tribunals designated by the Act. The defendant in error while not disputing the correctness of this contention in so far as it related to cars which would have been put by it to an interstate use, asserted that it had no application to cars for intrastate use, and claimed that in drawing the line between cars which would have been put to an intrastate and those which would have been put to an interstate use those should be classed among the former which would have been used by it for shipment of coal the title to which would have passed to the purchaser at the mines, notwithstanding the fact that the cars would have been consigned by it to points outside the State of Pennsylvania so that the transportation thereof would have been interstate in character.

The trial Court sustained this contention of the defendant in error, and its action in so doing was approved and affirmed by the Supreme Court of Pennsylvania.

In order to establish in part the discrimination complained of the defendant in error attacked the justness of the ratings which had been given to its mines by the plaintiff in error as a basis for determining the mines' allotable share of the cars available for distribution.

It appeared that prior to the institution of the action the defendant in error had instituted a proceeding before the Interstate Commerce Commission in which an award of damages was sought because of the discrimination complained of in the present action, and in this proceeding had alleged as one of the grounds of recovery an unfair rating of its mines, but that its claim in this respect was overruled by the Commission, the Commission holding that the ratings given to the mines were not unfair.

The plaintiff in error contended that this determination of the Commission was binding and conclusive, and that it was consequently not open to the defendant in error to attack the fairness of these ratings in this action. This contention, however, was overruled by the trial Court, and the question of the fairness of the ratings was submitted to the jury and its action was approved by the Supreme Court of Pennsylvania.

The plaintiff in error, further contended that as the proceeding before the Interstate Commerce Commission already referred to had been prosecuted and had eventuated in an award in favor of the defendant in error, which award represented the damages which the Commission found had been sustained because of the failure of the plaintiff in error to deliver to the defendant in error all the cars which the Commission had found should have been delivered, that such proceeding and the award made therein were a bar to the present action. This contention was also overruled by the trial Court and its action was affirmed by the Supreme Court of Pennsylvania.

In the proceeding before the Commission the averments of discrimination in the distribution of cars were confined to deliveries made at three out of the five mines operated by the defendant in error. As to two of these mines no averments were made of any discrimination in respect to the deliveries of cars made thereat, and no testimony was offered tending to establish such discrimination.

There was a large amount of testimony introduced by both sides bearing upon the question whether the defendant in error had or had not received the cars which it was entitled to. This issue was resolved by the jury in favor of the defendant in error, and while the plaintiff in error contended and still believes that this finding was not justified by the evidence, counsel have not felt that they would be warranted in asking the Court to review the great mass of testimony which was submitted upon the trial which had a bearing upon this question, and the specifications of error which have been filed present for the consideration of this Court only those issues which have been raised by the contentions to which we have already referred.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“1. The Court below erred in overruling the defendant’s motion to dismiss the case for want of jurisdiction to entertain the same.”

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“12. The Court below erred in refusing the defendant’s third point, which point was as follows:

“3. The evidence has established that the bituminous coal transported by the defendant during the period of the action was transported from mines located in the State of Pennsylvania to points both within and without the State; that in making distribution of its coal cars among shippers of such coal during the period of the action, the defendant did not make one distribution of cars intended for shipments to points within the State and another one of cars intended for shipments to points without the State, but made but one distribution, leaving the shippers at liberty to use the cars for shipments to points either within or without the State as they might elect. Under these circumstances, the defendant, in respect to the distribution made, was subject to the obligations and prohibitions imposed upon it by the said Acts of Congress, known as the “Interstate Commerce Acts,” and to these exclusively, and as actions for non-observance of obligations or of prohibitions imposed by or embodied in these Acts are cognizable exclusively either by the Interstate Commerce Commission or by the Courts of the United States, there can be no recovery in this action by the plaintiff of the discrimination complained of.”

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“13. The Court below erred in refusing the defendant’s fourth point, which point was as follows:

"4. The evidence has established that prior to the institution of this action the Interstate Commerce Commission of the United States, acting under and pursuant to the authority conferred upon, and vested in, it by the Acts of Congress, known as the "Interstate Commerce Acts," defined and prescribed the method or system of car distribution which should have been observed and followed by the defendant in this action during the period thereof. As the result of such action by the said Commission, and of the orders previously made by the Commission, which have been given in evidence, defining and prescribing the method of car distribution which the said Interstate Commerce Act enjoined upon carriers subject to its provisions this Court is without jurisdiction to entertain the present action, in so far as it is rested upon the discrimination complained of by the plaintiff, and the plaintiff, consequently is not entitled to recover on this ground.

" 'Refused.' "

4. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"14. The Court below erred in refusing the defendant's fifth point, which point was as follows:

"5. The evidence has established that prior to the institution of the present action, to wit, on or about the 5th day of June, 1907, the plaintiff in this action instituted a proceeding against the defendant in this action before the Interstate Commerce Commission of the United States for the purpose of obtaining, *inter alia*, an award in its favor covering the damages which it complained it had sustained because of the failure of the defendant to properly rate its mines, Falcon Nos. 2, 3 and 4, and to give to them the number of cars which it claimed should have been delivered at these mines if a proper system or method of distributing its cars had been pursued by the defendant, and because of the inadequacy of the defendant's equipment during

the period of the present action; that the said proceeding eventuated in two reports and orders promulgated by the said Interstate Commerce Commission on March 7, 1910, and March 11, 1912, respectively, the latter of which made an award of damages in favor of the plaintiff in the said proceeding, being the plaintiff in this action, and against the defendant in said proceeding, being the defendant in this action, covering the loss which the Commission found the plaintiff had sustained because of the failure of the defendant to give to the said Falcon Mines Nos. 2, 3 and 4, the cars which the Commission found should have been delivered to them, and which would have been used for interstate shipments. Such proceeding and the award of the Commission made therein preclude the plaintiff from maintaining the present action, in so far as it relates to Falcon Mines Nos. 2, 3 and 4, and from recovering herein the loss, if any, which it sustained because of the failure of the defendant to give to the said mines more cars than were delivered at the said mines during the period of the action.

“ ‘Refused, reserving the legal propositions involved therein.’ ”

5. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“15. The Court below erred in refusing the defendant's sixth point, which point was as follows:

“ ‘6. It appears that in the proceeding instituted before the Interstate Commerce Commission by the plaintiff against the defendant the award made in favor of the plaintiff was based upon and covered the loss which the Commission found the plaintiff had sustained due to the greater cost of producing all the coal mined in the period of this action at Falcon Mines Nos. 2, 3 and 4, because of the failure of the defendant to place a larger number of cars at the mines named than were actually delivered to them. The plaintiff cannot, therefore, in

the present action recover the amount of such increased cost.

“ ‘Refused, reserving the legal proposition involved therein.’ ”

6. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“16. The Court below erred in refusing the defendant's seventh point, which point was as follows:

“ ‘7. The plaintiff cannot recover in this action the damage or loss, if any, sustained as the result of its failure to receive from the defendant cars which would have been used for shipments to points without the State of Pennsylvania. Cars which would have been consigned by the plaintiff to purchasers at destinations outside the State would have been so used, even though the coal loaded therein was sold under contracts providing for delivery to such purchasers f. o. b. cars at the plaintiff's mines.

“ ‘Refused.’ ”

7. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“18. The Court below erred in refusing the defendant's ninth point, which point, and the answer of the Court thereto, were as follows:

“ ‘9. The evidence has established that the Interstate Commerce Commission has determined that the system or method of ratings pursued by the defendant during the period of the action was a proper and lawful one, and subjected the plaintiff and other shippers to no discrimination or disadvantage, and that the ratings actually given to the plaintiff's mines were fair and proper. This determination by the Commission is binding and conclusive, and the plaintiff cannot, therefore, recover in the present action because of the ratings actually given to their mines.’ ”

“Answer. ‘Refused, for the reason that while the system or method of rating adopted by the defendant company may have been sanctioned by the Interstate Commerce Commission, the question here was as to whether or not there was discrimination practiced against the plaintiff even under that system or method of rating.’”

8. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“19. The Court below erred in refusing the defendant’s eleventh point, which point, and the Answer of the Court thereto, were as follows:

“11. There is no evidence which would warrant the jury in finding that the plaintiff was subjected to any unlawful discrimination because of the ratings given to its mines during the period of the action by the defendant.’”

“Answer. ‘Refused, for the reason that there is some evidence tending to show an unlawful and unfair discrimination because of the ratings in comparison with the mines of other shippers.’”

ARGUMENT.

COURT WITHOUT JURISDICTION TO ENTERTAIN THE ACTION.

By its motion to dismiss and by the third and fourth points or requests for charge presented by it, plaintiff in error challenged the right of the Court below to entertain the action upon the ground that in respect to the distribution of its cars it was subject exclusively to the obligations and prohibitions of the Interstate Commerce Act, and that if it had failed to conform to these to the injury of the defendant in error, the latter’s sole recourse was to the Federal tribunals designated by that Act as those before which actions of such a character could be maintained.

The refusal to dismiss the action forms the basis of the first specification of error and the refusal to charge as requested forms the basis for the second and third specifications of error.

By the third point or request for charge thus presented the Court was asked to instruct the jury that there could be no recovery because "the defendant in respect to the distribution made was subject to the obligations and prohibitions imposed upon it by the said Acts of Congress, known as the Interstate Commerce Act, and to these exclusively, and as actions for non-observance of obligations or of prohibitions imposed by or embodied in these Acts are cognizable exclusively either by the Interstate Commerce Commission or by the Courts of the United States there can be no recovery in this action."

This point or request to charge questioned the jurisdiction of the Court upon the grounds relied upon in the cases of *The Pennsylvania Railroad Company vs. Puritan Coal Mining Company*, which has been lately argued before this Court, and *Penna. Railroad Company vs. Shonman Shaft, Coal Co.*, which will doubtless have been argued before this case is heard, and we shall assume that the Court does not desire a restatement of these grounds.

All the elements or conditions relied upon in those cases as sufficient to draw to the Federal tribunals exclusive jurisdiction of the cause of action are present in this case.

The plaintiff in error was an interstate transporter of the coal mined on its lines, and the defendant in error was an interstate as well as an intrastate shipper.

The act of distributing its cars was a single act of the plaintiff in error, and all cars distributed were available for both or either classes of shipments, at the election of the shippers receiving them.

And as in the *Puritan* case, so in the present case, we submit that inasmuch as the plaintiff in error was clearly subject to the Interstate Commerce Act in making distribution of its cars, and inasmuch as a double or divided authority or control over the single distribution made was impracticable, both legally and actually, the Federal control over the

act, because of the paramount authority of Congress, must be treated as exclusive of all State or other authority and control.

We submit, therefore, that both the trial Court and the Supreme Court of Pennsylvania were without jurisdiction to entertain the cause of action asserted in the present case.

There is one feature, however, of the present case which was not present in the Puritan case to which attention should be called. In the Puritan case the Coal Company's claim was limited to the damages which it alleged it had actually sustained due to the failure of the railroad company to deliver to it all the cars to which it claimed it was entitled. The claim, therefore, in that case, was the same as that which would have been asserted if the action had been brought because of a violation of the requirements of the Interstate Commerce Act. In the present case the claim is for three-fold the amount of damages sustained, and is not only, therefore, dissimilar from, but actually at variance with any claim which could have been presented if the action were based upon a violation of the Interstate Commerce Law.

In the Puritan case therefore the damages claimed were those, and only those, which would have been recoverable if the action had been brought in a Federal Court, and in holding that the plaintiff in that case could maintain its action in a State Court to recover these damages, the Supreme Court of Pennsylvania was controlled by the view that the cause of action which the plaintiff was asserting in that case was one that was referable both to the Statute of the State of Pennsylvania and the Interstate Commerce Act. But in the present case the cause of action, while in one sense the same, is in another sense radically different from that which could be asserted under the Interstate Commerce Act, for we have here a claim for treble the amount of the injury which the defendant in error claims it sustained; while if the action were under the Interstate Commerce Act, only the actual amount of the injury could be recovered.

To sustain the application, therefore, of the State Statute

which has been enforced against the plaintiff in error in this case would necessarily involve this result, that for a violation of an obligation which, even in the judgment of the Supreme Court of Pennsylvania, was devolved upon the plaintiff in error by the Interstate Commerce Act, a shipper claiming that he had been injured by such violation could, notwithstanding the fact that Congress has limited his recovery to the actual amount of the injury, recover three-fold the amount thereof and thus secure an advantage over other shippers which Congress evidently considered should be withheld.

There is also involved in the present case a feature which was not directly presented in the Puritan case by the evidence that was adduced therein. In that case no orders of the Interstate Commerce Commission defining the method of distribution to be pursued by carriers subject to the Interstate Commerce Act were put in evidence, and the Supreme Court of Pennsylvania determined the issue of jurisdiction in that case apparently, judging from its opinion, upon the assumption that no action of such a character had been taken by the Commission, save as to the method that should be pursued by carriers in dealing with one class of their cars, viz., their own fuel cars. This conclusion seems to be warranted by what was said by the Court in its opinion, for after referring to the decision of this Court in the case of *Interstate Commerce Commission vs. Illinois Central Railroad Company*, 215 U. S., 452, in which the validity of an order made by the Commission defining the extent to which the carrier's own fuel cars should be taken into account in determining the distribution to be made of the balance of its equipment, the Supreme Court of Pennsylvania said:—

“It is impossible to conceive of any local or other conditions which would prevent such order with respect to the fuel cars of the carrier from operating generally with the same measure of justice and equity to all, and hence we conclude that not only does the rule announced govern in the regulation of the Illinois Cen-

tral Railroad Company, but that it applies to and governs, upon the authority of the cases above cited, all railroads; *that it is as much the law of the land as though written in the lines of the Interstate Commerce Act, and that having been legislated upon by the Commission, exclusive jurisdiction with respect thereto vests in the Federal tribunal.* (Page 451.)

Clearly it would appear that the view of the Court at the time the Puritan case was decided was that the order of the Interstate Commerce Commission to which reference was made in the opinion ousted State Courts of any jurisdiction which they might otherwise have had of actions involving the proper method of counting a carrier's fuel cars.

In the present case there were put in evidence orders of the Interstate Commerce Commission which had prescribed the method that should be pursued not by other carriers merely, but by the carrier which was before the Court in the distribution of all of its coal cars (see Transcript of Record, page 96), and it would seem, therefore, that the Supreme Court of Pennsylvania should, following the view enunciated by it in the opinion in the Puritan case, have held that the method of the plaintiff in error's distribution, to quote its own language, "having been legislated upon by the Commission, exclusive jurisdiction with respect thereto vests in the Federal tribunals." The Court, however, declined to follow the view which it had expressed to what we conceive to be the logical and inevitable conclusion, and held in the present case that the jurisdiction of the Federal tribunals had not been rendered exclusive as the result of the action of the Interstate Commerce Commission because this action had not antedated the period of time embraced in the present case. On this point the Supreme Court adopted as controlling the view of the trial Court which was expressed as follows:—

"The period sued for, between October, 1905, and April 30, 1907, antedates all general rules, regulations or orders of the Interstate Commerce Commission which could by any construction be said to be ap-

plicable to the case in hand. We are clear, therefore, that the general proposition of a want of jurisdiction in the State Court is not sustainable."

(Transcript of Record, page 141.)

But the Court was clearly in error in assuming that the findings and conclusions of the Interstate Commerce Commission had not been made effective by that body in the period covered by the present case. It is true that the dates of the several orders were subsequent to this period, but the conclusion or finding upon which the order was based was treated by the Commission as applicable to the period of the present action and as determining the method of distribution which ought to have been pursued during the whole period thereof.

The right of the Commission to make its findings retroactive cannot probably be gainsaid, and if, therefore, the Supreme Court of Pennsylvania was right in the view which it expressed in the Puritan case as to the effect upon the jurisdiction of State Courts of an order of the Interstate Commerce Commission regulating a carrier's system of car distribution then it would seem inevitably to follow that in the present case this view should have been enforced because it is undoubted that the Interstate Commerce Commission did define the system of distribution that the plaintiff in error should have followed during the period covered by the present action, and enforced this finding by an award of damages because another and conflicting system had been followed.

We do not wish to be understood by what we have said as acquiescing in the view upon which the Supreme Court of Pennsylvania has acted that the jurisdiction of the Federal tribunals in cases of the character now before the Court becomes exclusive only after action by the Interstate Commerce Commission defining the methods or rules of procedure to be followed by a carrier in order to comply with the general obligations and requirements imposed by the Interstate Commerce Act. We disagree entirely with that view which indeed is refuted by what was said by the Court itself in the Puritan case. Congress, said the Court, "com-

mitted to the Interstate Commerce Commission the *task of definition*," and when the Commission has acted and has properly interpreted the provisions of the Interstate Commerce Act, then such interpretation becomes, to quote again from the Court's opinion, "as much the law of the land as though written in the lines of the Interstate Commerce Act."

But this result follows not because the Commission has added to or enlarged or amended the legislation of Congress, but solely because it has interpreted the same.

Upon what theory can it be claimed that by the mere act of interpretation the Commission has added to the legal force and effectiveness of Congressional enactments? The theory upon which the Supreme Court of Pennsylvania acted in the Puritan case necessarily leads to the conclusion reached by it but which, we submit, is wholly inadmissible, viz., that Congress by the mere enactment of Section 3 of the Interstate Commerce Act did not thereby withdraw from State control the subject matter of the section, but that this result follows when and only when the Interstate Commerce Commission in the exercise of the powers conferred upon it interprets and defines the significance and effect of the provisions of the Section and by proper action makes effective the conclusions reached by it.

Congress has in general terms made it unlawful for a carrier to unduly discriminate against any shipper in the distribution of its equipment. It has not prescribed the system or method which carriers should pursue in order to avoid the discrimination prohibited, but has it not by prohibiting the undue prejudice or disadvantage, necessarily enjoined upon carriers the obligation or duty to do whatever is necessary to prevent the undue prejudice or discrimination which it has prohibited? And is not therefore the conclusion inevitable that in determining the effect of this Congressional action upon the power of States to legislate in respect to the same matter, the same effect and control must be accorded to it that would have been accorded if Congress had in express language prescribed what a carrier should do in order to avoid the prejudice or discrimination prohibited?

Applying the theory of the Supreme Court of Pennsylvania to the particular feature of the Interstate Commerce Act with which we are concerned in the present case, this wholly inadmissible conclusion would seem to be inevitable.

Congress by Section 3 of the Interstate Commerce Act has in effect enjoined upon carriers a fair and equal distribution of their equipment when a *pro rata* distribution is necessary. It has not declared what method or system of distribution must be followed in order to bring about this result, but this duty it has devolved upon a body created by it for this and other purposes, viz., the Interstate Commerce Commission.

But, notwithstanding the creation of this special tribunal to interpret and administer Section 3 of the Act, the State Courts are at liberty to perform the functions devolved upon it until the Commission has acted and has put carriers under compulsion of some finding or order.

The mere statement of this proposition would seem a sufficient refutation of its correctness.

But if the contention of the defendant in error be sound that state courts have jurisdiction of actions of the character of the present one, if the demands asserted therein are referable to or grow out of the non-delivery of cars which would, if delivered, have been put to an intrastate use by the shipper, then it is necessary to determine whether the recovery in the present case has been limited to damages resulting, as claimed, to the defendant in error from the non-receipt of cars which it would have put to an intrastate use.

CARS LOADED BY SHIPPERS CONSIGNED BY THEM TO POINTS OUTSIDE THE STATE IN WHICH THE SHIPMENTS ORIGINATED ARE VEHICLES OF INTERSTATE TRANSPORTATION, EVEN THOUGH TITLE TO THE SHIPMENT MAY HAVE PASSED FROM THE SHIPPER TO THE PURCHASER THEREOF AT THE POINT OF LOADING.

In the Puritan Coal Company case the trial Court held that a State Court had jurisdiction of the cause of action therein presented because the plaintiff had confined its claim

to the loss resulting from non-receipt of cars which would have been used in intrastate transportation, and it further held that cars would have been so used which would have been loaded with coal title to which passed from the Puritan Company to the purchasers at the mines, even though the subsequent transportation of the car was to a point outside the State of Pennsylvania.

The Supreme Court of Pennsylvania in that case did not commit itself to the view that cars of the character just referred to would have been used in intrastate transportation, but on the contrary it, by implication at least, held that they would not have been so used, for it determined the issues in the case upon the theory that the statute of the State of Pennsylvania which was enforced in that case was applicable to all cars both those which would have been used in interstate and those which would have been used in intrastate transportation.

In the present case the trial court adhered to the view upon which it acted in the Puritan case as to the class of cars to which we have referred, and the Supreme Court of Pennsylvania acquiesced therein, as will appear from the following extract from the opinion delivered by it:—

“It appears that practically all the coal involved in this action was sold f. o. b. cars at the mines, and is therefore not subject to interstate commerce regulation. This is necessarily so on principle, and seems to be the effect of the numerous decisions of the Supreme Court of the United States which are cited and commented on in the opinion of the learned Court below.”
(Transcript of Record, page 141.)

We do not mean by what we have said to indicate that the Supreme Court of Pennsylvania receded from the view which it had expressed in the Puritan case as to the concurrent control possessed by the Federal and State authorities over the subject of car distribution, and as to the concurrent jurisdiction of Federal and State tribunals under the conditions adverted to in its opinion in the Puritan case.

But in the present case the Court further committed itself to the proposition that what we shall designate for convenience as "f. o. b. cars" were "not subject to interstate commerce regulation."

The plaintiff in error by its seventh point had asked the Court to instruct the jury that there could be no recovery in the present case because of any loss resulting from its failure to deliver cars which would have been used for shipments to points without the State of Pennsylvania, even though the coal loaded therein was sold upon such terms that title passed to the purchasers thereof when the coal was loaded.

This instruction was refused, and this refusal forms the basis of the Sixteenth Specification of Error.

That a very large number of cars would have been eliminated from the present case had the instruction requested been given is established by the exhibit which will be found between pages 50 and 51 of the Transcript of Record. This exhibit is a reproduction of an exhibit which had been put in evidence by the defendant in error in the proceeding, to which we shall have occasion hereafter, to refer, instituted by it before the Interstate Commerce Commission, in which it sought to secure an award of damages on a cause of action identical in all respects with that which is embraced in the present case save that the present case covers car deliveries at two mines which were not included in the proceeding before the Commission. By referring to this exhibit it will be seen that in the ninth and fourteenth columns there are shown, respectively, what is designated as "total loss without the State" and "total loss within the State." The loss thus referred to is the loss claimed to have resulted from the non-receipt of the cars claimed by defendant in error. It is shown by years, but if the yearly losses are added, it will appear that the loss without the State, according to this exhibit, totaled in the period of the action \$36,401.12 and within the State \$19,349.12.

As the loss in each case was ascertained with reference to a uniform loss per ton, the difference in the aggregate

amount thereof is due solely to the difference in the respective amounts of tonnage that would have been shipped according to the then theory of the defendant in error to points without and to points within the State.

It appears from this exhibit, therefore, that the defendant in error in the proceeding before the Interstate Commerce Commission took the position that about 65 per cent. of the additional coal which it averred it could have shipped if cars had been available would have been shipped to points outside of the State of Pennsylvania, and it asserted in such proceeding that the cars which would have been used for the carriage of this 65 per cent. would have been vehicles of interstate transportation.

And as appears from the order of the Commission awarding reparation to the defendant in error which will be found at page 86 of the Transcript of Record, the Commission found that about 63 per cent. of the cars would have been used for interstate shipments and ascertained the damages and made its award on this theory. Subdivisions (b.), (c.) and (d.) of the order embrace the findings of the Commission as to shortage in the output of each of the three mines included in the proceeding resulting from non-receipt of cars which in the opinion of the Commission ought to have been delivered by the plaintiff in error and the proportions of this shortage which the defendant in error, to quote from the order, "would have shipped and sold at interstate destinations." The aggregate shortage was 131,240 tons and the interstate proportion thereof 82,165 tons, about 63 per cent. of the shortage.

In the present case, with the view of securing a larger judgment from a tribunal which in its view was only authorized to deal with its intrastate shipments, it has claimed, successfully so far, that all of the cars which would have been used for the carriage of this 63 per cent. of the additional shipments, would have been used as vehicles of intrastate transportation.

The result so far achieved by the defendant in error may be regarded as a tribute to the ingenuity of its counsel, whatever else may be said of it, and the extent to which it

has profited thereby appears from the following testimony of Mr. J. O. Clark, its President:—

"Q. What proportion of your shipments was made f. o. b. cars at mines in Clearfield County?

"A. Practically all of it. I would say from 95 per cent. to 98 per cent. of the total tonnage was sold f. o. b. cars at the mines." (Transcript of Record, page 48.)

And as it was claimed that the same percentage of the cars not delivered would have been used for f. o. b. sales, the defendant in error has in the present action recovered as to practically all the cars and in the proceeding before the Commission as to 63 per cent. thereof.

In the Puritan Coal Co. case we have presented our views in opposition to the theory that these f. o. b. cars which were consigned by the defendant in error to points outside the State of Pennsylvania can be properly regarded as intrastate cars. We shall not burden the Court with a restatement of them.

It may be well, however, to direct the Court's attention to the following testimony given by the president of the defendant in error as to the extent to which the use of the f. o. b. cars as vehicles of interstate transportation was brought about by the action of the defendant in error:—

"Q. Where coal was sold f. o. b. the mine it was shipped by the Clark Coal Mining Company?

"A. Yes, sir.

"Q. Consigned?

"A. Consigned by Clark Brothers.

"Q. To the ultimate destination?

"A. Yes, sir.

"Q. No matter where that was?

"A. Yes, sir." (Transcript of Record, page 48.)

ERRONEOUS SUBMISSION TO JURY OF QUESTION WHETHER RATINGS OF DEFENDANT IN ERROR'S MINES WERE INADEQUATE AND UNFAIR.

The system or method of rating mines pursued by the plaintiff in error had been questioned or attacked by the de-

fendant in error in the proceeding before the Interstate Commerce Commission which has already been referred to and the determination of the Commission thereon as well as the character of the system attacked is sufficiently indicated by the following extract from the syllabus of its opinion which will be found at page 96 of the Transcript of Record.

"To the physical capacity of a coal mine the defendant adds its commercial capacity tested by the shipments made from, it during the preceeding 12 months, and divides the sum by two; these two factors being revised quarterly, the mine is thus given a constantly corrected rating in the distribution of coal cars during percentage periods. If this basis is equitably applied to all mines served by the defendant, the Commission is unable to see that it results in an unequal, unfair, or discriminatory distribution of its equipment.

"The complainant's contention that physical capacity alone is the fair and sound basis for rating coal mines for car distribution is not sustained; the utmost obligation of a carrier under the law is to equip itself with sufficient cars to meet the requirements of a mine for actual shipment; and it is of no real concern to the carrier what are the physical possibilities of a mine in the way of daily output except as that factor may afford some measure of what its actual shipments will be."

The ninth point submitted by the plaintiff in error and the answer of the Court thereto were as follows:—

"The evidence has established that the Interstate Commerce Commission has determined that the system or method of ratings pursued by the defendant during the period of the action was a proper and lawful one, and subjected the plaintiff and other shippers to no discrimination or disadvantage, and that the ratings actually given to the plaintiff's mines were fair and proper. This determination by the Commission

is binding and conclusive, and the plaintiff cannot, therefore, recover in the present action because of the ratings actually given to their mines."

Answer. "Refused, for the reason that while the system or method of rating adopted by the defendant company may have been sanctioned by the Interstate Commerce Commission, the question here was as to whether or not there was discrimination practiced against the plaintiff even under that system or method of rating." (Transcript of Record, page 124.)

The refusal to charge as requested in this point forms the basis of the seventh Specification of Error.

That the ground upon which the trial Court rested its refusal to affirm this point was not justified we think will be established by the following extract from the testimony of the President of the defendant in error.

"Q. Now with reference to the ratings of your mines, you are aware, are you not, that the system of ratings prevailing during the period of the action took into account not merely the physical capacity of the mine to ship but also the actual volume of shipments that had been made by the various mines during the preceding period?

"A. Yes sir, I am thoroughly familiar with that system.

"Q. That was the system?

"A. Yes, sir.

"Q. Do you not know that when you sent Mr. Wolmelsdorf's report to the defendant or communicated the contents of it that the defendant adopted Mr. Wolmelsdorf's estimate of capacity in arriving at the ratings?

"A. Yes, sir, Mr. Trump accepted his estimate of the maximum physical capacity.

"Q. So your quarrel with the ratings is not because we failed to properly determine the capacity of your mines but because we didn't give the rating based

upon the capacity but upon the capacity and the shipments and combining those two arrived at the rating. In other words, your quarrel is with the system and not with our estimate of the physical capacity of your mines?

"A. Well, we don't believe the system is the proper system to operate under in the rating of the mines. We didn't care whether there was a system or not if we received cars.

"Q. I understand that, but you do not claim that in arriving at ratings under the system which we had in force we failed to give your mines a proper physical capacity, that we failed to take into consideration a physical capacity of your mines which was too low?

"A. No, sir, I don't claim that.

"Q. It is simply a question whether in combining that physical capacity with the shipments we adopted a proper method?

"A. That is it precisely." (Transcript of Record, pages 46 and 47.)

This, of course, was an unequivocal admission that so far as the ratings of its mines were concerned, the defendant in error's objections thereto were based solely upon the consideration that the railroad company "didn't give the rating based upon the capacity but upon the capacity and the shipments and combining those two arrived at the rating."

That the plaintiff in error had in arriving at the ratings of the mines of the defendant in error adopted the estimate of the physical capacity of three of the mines, Falcon Nos. 2, 3 and 4, made by the engineer of the defendant in error is established by further testimony of the president of the defendant in error:—

"Q. Mr. Clark, with respect to the question of ratings of your mines, is it not a fact that on October 20th, 1906, Mr. Womelsdorf, at your instance, made an examination of the mines in order to determine their physical capacity and made a report to you which

showed a physical capacity for Falcon No. 2 mine of 600 tons, at No. 3 of 120 tons and No. 4 of 275 tons?

"A. Yes, sir, he made such a report.

"Q. And that upon the receipt of that report you communicated Mr. Womelsdorf's figures to the Railroad Company and they were adopted by them for the purpose of establishing the ratings which were then established?

"A. Yes, sir; but Mr. Womelsdorf stated in this report that the rating capacity which he had assigned to these mines was conservatively made.

"Q. That is, his estimate of their physical capacity was a conservative estimate?

"A. Yes, sir.

"Q. But in May, 1907, when no change as you say had taken place in the mines which would have increased their capacity, the Railroad Company made an examination through its own inspector and in the case of No. 2 advanced Mr. Womelsdorf's figures from 600 tons to 709 tons. Is that right?

"A. They advanced the maximum physical capacity estimate.

"Q. In other words, they gave you credit for a larger physical productive capacity than Mr. Womelsdorf gave you as to No. 2?

"A. Yes, sir.

"Q. The same was true at No. 3?

"A. Yes, sir.

"Q. And that at No. 4 they found the same capacity that Mr. Womelsdorf had, 275 tons?

"A. Yes, sir.

(Transcript of Record, pages 48 and 49.)

And it was shown that the ratings of the other two mines of the defendant in error had been arrived at as the result of joint consideration and agreement upon the part of the superintendent of these mines and the officer of the railroad company who was charged with the duty of determining their physical capacity.

The ratings given to the mines were not as great as their physical capacity, due to a consideration which affected all ratings, viz., that the shipments therefrom were less than the productive capacity of the mines, and the combination of these two factors necessarily produced a rating lower than it would have been if the productive capacity had been alone considered.

Notwithstanding the refusal of the Interstate Commerce Commission to adopt as a correct basis for rating mines the physical capacity thereof the defendant in error insisted that it was entitled to have the number of cars which it should have received determined with reference to ratings equal to the physical capacity of its mines. This had been its claim before the Interstate Commerce Commission as is shown by the exhibit to which we have already referred which follows page 50 of the Transcript of Record, and in the present case this claim was reiterated, for by referring to the testimony of the President of the defendant in error, which will be found on pages 42 and 43 of the Transcript of Record, it will be seen that the basis used by him for arriving at the number of cars which the defendant in error should have received was the same monthly capacity which was embraced in the exhibit which had been used before the Interstate Commerce Commission, and as we have said, this exhibit was made up upon the theory that proper ratings would have been the mines' physical capacity, and it should be understood that the "Pennsylvania Railroad Company's ratings" referred to in this Exhibit are the "capacity" not the actual rating. Otherwise the exhibit would be misleading.

It would seem to be clear, therefore, that the attack of the defendant in error upon its mines' ratings was rested upon the proposition that the method or system of determining these ratings was wrong.

It will hardly be disputed that it would be wholly impracticable to rate a mine by one method or system for interstate cars, and by another method or system for intrastate cars. Inextricable confusion would result from any such attempt, even were two distributions being made, one

of the cars for interstate and the other of cars for intrastate use, but operation under a double system of ratings would be an impossibility where but one distribution was being made of cars.

Under these conditions it would seem to be clear that as a rating of mines is necessary under and is in effect enjoined by the Interstate Commerce Act, whenever a *pro rata* distribution has to be made by a carrier of cars, and as the Interstate Commerce Commission has been designated by that Act as the body which is to determine what method or system of rating should be followed, the conclusion reached by it must necessarily, because of the paramount authority of Congress, be the controlling one. In the present case, therefore, the jury should, we submit, have been expressly instructed that for the purposes of making distribution of its equipment the system of ratings under which the plaintiff in error was operating was not open to question, and that the physical capacity, therefore, of the mines of the defendant in error must be disregarded in determining the number of cars which the plaintiff in error should have delivered.

If juries are to be permitted to revise ratings of mines in the manner in which the jury in the present case was instructed it might, the same result as to inequality of treatment of shippers will undoubtedly result, which led this Court in the Abilene and the other cases which have followed it to the conclusion that the main purpose of the Interstate Commerce Act would be defeated by permitting any other tribunal than the Interstate Commerce Commission to determine questions arising under the Act as to which uniform determination was necessary in order to avoid the inequality of treatment which it was the main purpose of the Interstate Commerce Act to terminate.

But the ratings of three of the mines which are involved in the present case during the period which is embraced in the present action, were considered by the Interstate Commerce Commission, and the conclusion reached by it was thus expressed:—

"Finally, it must be observed that neither of the petitioners made complaint to the defendant, at any time, of the ratings of their mines, and when finally they did complain the defendant accepted their engineer's statement or estimate as to their actual working capacity. Under these circumstances we see no substantial basis for any finding of discrimination against the complainants with respect to the defendant's ratings of their mines." (Transcript of Record, page 92.)

We have, therefore, in the present case a direct finding by the only tribunal which, we submit, was competent to pass upon the question, that the ratings of the defendant in error's mines, at least of those which were involved in the proceeding before the Commission, were not unfair, and subjected the defendant in error to no discrimination.

While it is true that in the proceeding in which this conclusion was reached the ratings of but three of the five mines involved in the present action were passed upon by the Commission, this fact does not, we submit, leave open to the determination of a jury the correctness of the ratings of the other two because of the objections to which we have already called attention to such a method of determining the propriety of mine ratings and clearly the ratings of the three mines which were passed upon by the Commission were not for the jury.

It was urged in the Supreme Court of Pennsylvania, and will doubtless be urged here that the trial Court was justified in permitting the jury to pass upon the question of the ratings because of testimony tending to show that the defendant in error's shipments had been curtailed throughout the period of the action by failure to receive the number of cars to which it was justly entitled, and as the volume of the shipments made was one of the factors in arriving at the rating, it was proper to permit the jury to determine, if they found that additional cars ought to have been delivered, to what extent the ratings were disadvantageously affected by the non-receipt of the same.

But these considerations were before the Interstate Commerce Commission and did not lead that body to the conclusion that the ratings were unfair. But waiving this and assuming that a jury is a proper tribunal to pass upon ratings, the question of the correctness of those given to the defendant in error's mines should not have been submitted for the consideration and supervision of the jury in the present case, unless there was testimony which would enable the jury, if they found the ratings inadequate, to determine what the proper ratings should have been, and we submit that the testimony afforded no basis for any correct finding in this respect.

The claim of the defendant in error was that it had been deprived of certain cars, due to over-deliveries made at the mines of two other operators.

It was not shown that the cars which it was claimed constituted the over-deliveries were taken from those which would otherwise have been allotted to the defendant in error. Presumably, therefore, they had been withdrawn from the number available for distribution among the shippers generally including therein the defendant in error.

If these cars, therefore, had not been delivered to the two shippers who, it was claimed, had received more than they were entitled to, they would have been distributed among all the shippers whose mines were entitled to share in their distribution. The result of this would have been that all the mines other than those of the two shippers in question would have had the volume of their shipments increased *pari passu* with those of the defendant in error, with the result that the ratings of these shippers would have been advanced proportionately as greatly as would those of the defendant in error. The result, therefore, would have been that the ratings of the defendant in error's mines would have borne the same relation to the aggregate ratings as did those which were actually accorded to their mines, and in this event their percentage of the cars for distribution would not have been appreciably increased.

Even, therefore, if a jury was a proper and competent tribunal to revise the ratings of mines, the evidence to es-

tablish that the defendant in error had suffered any injury or had been deprived of any cars because of the ratings which had been in force throughout the period of the action was entirely too flimsy and indeterminate to warrant the trial Judge in permitting, the jury, as he did, to disregard the established ratings, and to substitute therefor whatever ratings they considered would have been proper.

**AWARD OF THE INTERSTATE COMMERCE COMMISSION
A BAR TO ANY OTHER PROCEEDING IN RESPECT TO CAUSE
OF ACTION WHICH FORMED THE BASIS OF THE AWARD.**

It was shown that a proceeding had been initiated by the defendant in error before the Interstate Commerce Commission to secure an award of damages because the plaintiff in error had failed, as was averred, to allot to mines Nos. 2, 3 and 4 of the defendant in error their proper share of the cars which had been distributed in the period of the present action. No claim was advanced in this proceeding that there had been like failure as to mines Nos. 5 and 6.

The Commission considered the case and made an award in favor of the defendant in error covering the damages which it found had been sustained, due to non-receipt of the cars which the Commission found the defendant in error was entitled to, which would have been used for interstate shipments.

This proceeding and the award obtained thereunder preclude, we submit, the defendant in error from maintaining the present action, at least in so far as this is rested upon a right to recover in respect to cars which would have been used for interstate shipments.

The justification for ignoring this proceeding and the award made thereunder were thus stated by the Supreme Court of Pennsylvania:

"We do not regard as sound the contention that the plaintiff company is precluded from prosecuting

this action because it complained to and had a ruling by the Interstate Commerce Commission against the discriminatory acts of the defendant. It appears that practically all the coal involved in this action was sold f. o. b. cars at the mines and is therefore not subject to interstate commerce regulation."

* * * * *

"A judgment of a Court of competent jurisdiction is a bar to further proceedings on the claim in any tribunal. But an award of the Interstate Commerce Commission is not a judgment in the sense that it concludes the enforcement of the claim on which it rests in a Court having jurisdiction of the cause of action. The Act of Congress gives no such effect to an award, but simply makes it *prima facie* evidence of the facts contained therein in an action brought on it in a State or Federal Court." (Transcript of Record, page 141.)

The soundness of the first position taken by the Court, of course, primarily depends upon the question whether the cars which would have been used for f. o. b. shipments are because of that consideration alone taken out of the category of cars which would have been used for interstate shipments. That the question whether these cars are to be regarded as interstate or intrastate vehicles of transportation is not dependent upon the consideration whether title to the coal which would have been loaded therein would have passed from the defendant in error at the mine is a proposition which we have already discussed.

But there is another answer to the position taken by the Court which we are considering, and it is this: In the proceeding before the Commission the defendant in error, as we have already pointed out, claimed that it would have used 65 per cent. of the cars which it asserted it should have received for

interstate shipments, and the award which it secured from the Commission was based upon this averment. The defendant in error, therefore, is clearly estopped from asserting that the award of the Commission should go for naught because the damages thereby awarded were based upon an assumed use for interstate purposes of cars which it now claims would have been used for intrastate purposes.

We are not here considering what was the actual use to which certain cars were put, but what would have been the use to which certain undelivered cars would have been put by the defendant in error, and if, as clearly appears, in the proceeding before the Interstate Commerce Commission, the defendant in error asserted that it would have put these cars to an interstate use, is it not clearly estopped from asserting in the present proceeding that the use would have been an intrastate one when the purpose of such an assertion is to enable it to duplicate damages? Of course, if the Interstate Commerce Commission had been without jurisdiction to pass upon the claim advanced by the defendant in error in the proceeding before it or to award damages in respect thereto, then doubtless the award which it made would have to be regarded as nugatory and would constitute no bar or obstacle to the maintenance of the present action. But if the Commission had jurisdiction to award damages in so far as these were referable to the non-receipt of cars which would have been used for interstate shipments, and the defendant in error had secured an award by representing that certain cars would have been so used, if these had been delivered to it, the award is in no sense invalidated upon the ground of jurisdiction even though the defendant in error should thereafter disavow the position taken by it before the Commission.

The other ground upon which the Supreme Court of Pennsylvania declined to recognize the award as interfering with the right of the defendant in error to recover in the present case was that the award was not, in the

opinion of that Court, "a judgment in the sense that it concludes the enforcement of the claim on which it rests."

We do not understand that the Supreme Court of Pennsylvania was questioning the rule of law which is thus expressed in Black on "Judgments":

"In regard to its conclusiveness upon the points adjudged and as a bar to a future action for the same cause, an award of arbitrators, which is regular and final, has precisely the same effect as a judgment or a decree of court." Section 526.

Or, as stated in another form, in Section 688:

"A valid award of arbitrators upon a matter duly and properly submitted to their decision effects a merger of the cause of action which is thereupon completely extinguished and the award will constitute a bar to the prosecution of an action at law or in equity upon the same demand."

That the rule of law embodied in the above quotations is in force in Pennsylvania was conceded by the trial Judge, as will appear from the following extract from his opinion overruling the motion for a new trial:

"The learned counsel for the defendant contends that this suit is barred because of the recovery of the award. It is of course well settled that a judgment obtained in a court of competent jurisdiction is a bar to a second suit whether in law or in equity. * * * An award of arbitrators, after reference thereto, is equally binding. * * * The above cases cited from the brief of the learned counsel for the defendant are conclusive of the principles therein set forth, but the argument made therefrom to the effect that the award of the Interstate Commerce Commission is equally a bar as is a judgment, a decree in equity or an award of arbitrators is not

sustainable on any authority. The language of the Interstate Commerce Act does not make the award a judgment enforceable by the Commission or even by a Court. It does make that award when used as the basis of a suit in a United States Court a *prima facie* finding of the facts therein stated.

* * * This award of the Interstate Commerce Commission is clearly distinguishable from a judgment in every respect. It is not enforceable by any process. It does not become a lien upon any property of a defendant. It does not purport to be final and conclusive in any way. If used even as a *prima facie* evidence of what it purports to contain, it is subject to attack when so used in a duly established court." (Transcript of Record, page 135.)

The reasons given in the above quotation for differentiating the award with which we are concerned from awards generally were practically adopted by the Supreme Court of Pennsylvania. Its view may be summarized in the following extract from its opinion:

"But an award of the Interstate Commerce Commission is not a judgment in the sense that it concludes the enforcement of the claim on which it rests in a court having jurisdiction of the cause of action. The Act of Congress gives no such effect to an award, but simply makes it *prima facie* evidence of the facts contained therein in an action brought on it in a State or Federal Court." (Transcript of Record, page 141.)

Do the various considerations adverted to in the above extracts tend to distinguish an award of the Interstate Commerce Commission from an ordinary award?

It is said that the award of the Commission is not "enforceable by any process," but in this respect it is no different from an ordinary award which is not enforceable until judgment has been entered thereon.

It is said that "it is not a lien upon any property of a defendant," but in this respect it is no different from an ordinary award.

It is further said that it is not "final and conclusive in any way." This, of course, is begging the question, but in addition is erroneous, for the award of the Commission is final and conclusive in respect to the cause of action asserted in the proceeding in which the award is made in the sense that it is not open to the complainant in that proceeding to proceed after the award has been made in respect to the cause of action asserted therein; his remedy is confined to an action for the recovery of the sum awarded.

It is true, of course, that the award of the Commission is not in a technical sense a judgment, but neither is an award of arbitrators. In respect to both characters of awards further proceedings must be had before they ripen into judgments. The fact that the proceeding which must be followed in order to effect this result is different in the two cases would seem to be immaterial. At common law the procedure necessary to convert an award into a judgment seems to have been that which must be pursued in the case of an award of the Commission.

"Originally at common law an award could be enforced only by action or by way of a bar to another action for the same cause, or in a proper case specific performance could be sought in equity. In the time of Charles II, however, a practice grew up of making the award a rule of court and enforcing it by attachment and this practice was subsequently affirmed and fixed by statute. At the present time the usual method of enforcement is by entering judgment on the award, though the common law remedies are still available.

"At common law the only way to enforce an award not made a rule of court is by an action on it on the bond of submission." *Cyclopedia of Law and Procedure*, Volume III, page 776.

But we are not required in the present case to resort to the rules of law relating to the conclusiveness of awards in general in order to support the contention that the award of the Interstate Commerce Commission in the present case was a bar to the present action.

Section 9 of the Interstate Commerce Act provides that an action may be brought of the character of the present one either before the Commission or before the Federal Courts by any person or persons injured, but it is further provided that "such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

It was clearly, we submit, the purpose of Congress to confine anyone who should avail himself of the right conferred by the Act to proceed before the special tribunal thereby constituted, viz., the Interstate Commerce Commission, to the special remedy thus provided. It is, of course, true that there is no provision in the section which in terms deprives anyone who has proceeded before the Commission from proceeding for the same cause of action before a State Court. The reason for this omission is that the section does not contemplate as possible a proceeding before a State Court, but that the intention was to confine any complainant who should resort to the Commission for redress to the remedy which he had elected to avail of is clear, and it would be a most anomalous result if a shipper were to be debarred because of a previous resort to the Interstate Commerce Commission from proceeding in the Federal Court to recover damages claimed to have been sustained because of a breach of the obligations by a carrier of the Interstate Commerce Act, but was left at liberty to proceed for the recovery of such damages in a State Court.

But by proceeding before the Interstate Commerce Commission and securing an award the complainant not only debars himself from proceeding elsewhere because of his election to avail himself of the special remedy provided by the Interstate Commerce Act, but the

cause of action which he asserts in that proceeding becomes merged in the award and is consequently not available to him as the basis for any further action except as it may be involved in an action brought for the recovery of the amount of the award. Clearly it would seem that in this, as in ordinary cases of awards, a merger of the cause of action results:

"It is the general rule that a valid award operates to merge and extinguish all claims embraced in the submission. Thereafter the submission and award furnish the only basis by which the rights of the parties can be determined and constitute a bar to any action on the original demand." *Cyclopedia of Law and Procedure*, Volume III, page 729.

That Congress intended that this result should follow an award of the Interstate Commerce Commission would seem to be undoubted. This view was recognized in the case of the *Penn Refining Company vs. Western New York & Pennsylvania Railway Company*, 137 Fed. Rep., 343, by the Circuit Court of Appeals for the Third Circuit. There the Court was required to determine the extent of the limitation put by Section 9 of the Interstate Commerce Act upon the right of action of any one who had proceeded before the Interstate Commerce Commission. In that case the plaintiff in the action had so proceeded, and had secured an award and had then brought an action on this award, and upon the trial of this action the jury had been instructed that the plaintiff was not limited to the damages which the Commission had awarded. This instruction was, however, held to have been erroneous.

"The fact," said the Court, "that where a remedy is sought for the recovery of damages resulting from a violation of the provisions of the Act there must be an election between procedure by complaint to the Commission and procedure by suit or action in the proper court, leads to the same conclusion. Both remedies cannot be pursued either contemporaneously or suc-

cessively. To permit the recovery, in an action brought for violation of or disobedience to an order of pecuniary reparation of damages not included in such order would involve judicial sanction of a virtual blending of both remedies in palpable disregard of the provision that the petitioner 'shall not have the right to pursue both of said remedies,' but must in each case make an election between the two." (Page 355.)

In the proceeding which eventuated in the award of the Commission which is involved in the present case no allegation was made that the mines of the defendant in error known as "Falcon No. 5 and No. 6" had failed to receive the cars which they were entitled to. The allegation of discrimination was confined entirely to the other three mines, Falcon Nos. 2, 3 and 4, and consequently the award made by the Commission had reference to these three mines only, and, as has already been pointed out, the damages which were awarded were confined to those which the Commission found were referable to the non-receipt of cars which would have been used for interstate shipments.

The award, although not extending to mines Nos. 5 and 6, nevertheless, we submit, operates to bar the present action as effectively as to these mines as to the other three to which the award did extend unless it should be held that the defendant in error was at liberty to split the cause of action as to all of its mines and to proceed before the Commission as to three of them and elsewhere as to the other two.

Any such view, however, would be inconsistent with the rule of law that a cause of action for damages growing out of a tort is not severable.

That the cause of action which the defendant in error asserted before the Commission and is asserting in the present case is based upon a tort, or the equivalent of a tort, will hardly be disputed, and that it grew out of or was referable to the alleged non-observance by the

plaintiff in error of a duty which was not a separate duty as to each mine of the defendant in error, but was a general duty as to all its mines, this duty being to make a fair and equal allotment among all mines, cannot, we submit, be successfully disputed.

When the defendant in error consequently proceeded before the Interstate Commerce Commission, it was bound to submit its whole case to that body and it could not withhold part of its claim and proceed before some other tribunal for the recovery of the part withheld.

The trial Court was not specifically asked, however, to give such effect to the award as would debar the defendant in error from recovering in the present action any damages which it had established a right to recover in respect to its mines Nos. 5 and 6. The Court was, however, asked to instruct the jury by the fifth point or request for charge of the plaintiff in error, which is embodied in the fourteenth specification of error that by proceeding before the Commission and securing an award the defendant in error had debarred itself from recovering in the present action any loss which it might have sustained because of the failure of the plaintiff in error to deliver a larger number of cars at these mines than were actually delivered thereat. It will be observed that the point or request was not restricted to loss resulting from failure to deliver cars which would have been used for interstate shipments, but extended to loss resulting from failure to deliver any additional cars.

This point or request was justified by the consideration, to which we have already adverted, that the defendant in error was bound to embrace in the proceeding before the Commission all damages which it could properly claim therein, and as in our view the jurisdiction of the Commission extended to the claim as an entirety, as well to that part of it which was referable to intrastate cars as to that which was referable to interstate cars, the defendant in error could not consequently withhold

that part of the claim which had reference to cars of the latter description, and then proceed to recover this in the present or any other action.

There is a question, however, connected with the Commission's award to which the attention of the Court should be directed.

If jurisdiction to make this award was lacking the award itself was invalid and it can have no effect upon the right of recovery of the defendant in error in the present case.

And in the opinion of the majority of its members the Commission had no power to make the award which it actually made for reasons which will be referred to.

In *Joynes vs. Pennsylvania Railroad Company*, 17 I. C. C. Rep., 361, the Commission had passed upon the question of its right to entertain claims for damages which had no relation to the rates of a carrier. In that case the plaintiff had claimed damages resulting from alleged unlawful discrimination in the handling by the defendant therein of his shipments and those of his competitors, and dealing with the case thus presented, and with its power to entertain the same, the Commission said:

"When our jurisdiction is invoked under a complaint of that nature we can and ought to ascertain whether the discrimination complained of in fact exists or whether the carrier complained of has in fact failed in a duty imposed upon it by any provision of the Act as charged in the complaint. Such matters are ordinarily technical in nature, and the justice of such complaint can be determined more readily by the Commission than by a jury. But having ascertained the existence of the discrimination or the commission of an act or the omission of a duty, the Commission should leave the assessment of any resulting damages to be determined in a formal action brought in a Court of competent jurisdiction." (Page 367.)

The Commission, after referring to the various sections of the act which had a bearing upon the question which it was considering, continued:

"It (*i. e.*, the Interstate Commerce Act) makes of the Commission what it was undoubtedly intended to be, a special expert body created for the purpose of dealing with the rates and the rules, regulations, and practices of carriers affecting rates, and not a body to which shippers might resort for the redress of alleged wrongs of the character involved in this complaint, of which Courts have long had jurisdiction, and as to which they are fully equipped for doing exact justice.

"Our conclusion is that the Commission is without power to make awards of general damages of this kind. The complaint must, therefore, be dismissed, and such an order will be entered unless we are advised by the complainant of his desire to have the Commission consider whether, apart from the question of the general damages claimed, the acts of the defendant as alleged in the complaint constituted an undue and unjust discrimination." (Page 369.)

The proceeding which eventuated in the award which we assert operates as a bar to the present action was one of several of a similar character, and in all of them the question was involved of the right of the Commission to award damages in the event that it should find that in respect to the acts complained of, *viz.*, the distribution of coal cars, the complainants in the proceedings had been subjected to undue discrimination. The Commission's first decision, which dealt with the legality of the rules governing the distribution of cars which were in force during the period of the complaints, was delivered in the proceeding instituted by the Hillsdale Coal & Coke Company, and this will be found reported in 19 I. C. C. Rep., page 356.

In this decision the Commission found that the rules in force subjected the complainant in that proceeding

and the defendant in error in the present action to unjust discrimination, but in dealing with the right to award damages because of this discrimination, the majority of the Commission adhered to the view expressed in the Joynes case.

"The complaint herein," said Commissioner Harlan, delivering the opinion of the Commission, "was filed before our decision in *Joynes vs. P. R. R. Co.*, 17 I. C. C. Rep., 361, was announced. In that proceeding damages were demanded for losses alleged to have been suffered in the decay of the complainant's fruit by reason of an alleged discrimination against him in favor of other dealers in fruit to whom the defendant, as the complainant contended, had given a preferred use of its unloading platform, thus delaying his shipments until the fruit was spoiled. We held, upon grounds that are there fully stated and need not be repeated here, that while the Commission was competent to find that a discrimination had been practiced, the measurement or ascertainment of the damages the complainant had suffered in consequence thereof was a judicial question for the courts and not for the Commission; the view expressed was that the only damages that may be assessed by the Commission under the amended act were rate damages or damages that could be measured by the difference in the rate actually charged and the rate which, for any reason under the act, ought lawfully to have been charged; and that the complainant's remedy for the damages in compensation of the loss suffered in the value of this fruit was in the courts. That case differs from this in that it involved a single wrong in the nature of a tort against a particular shipper, while this case in its larger aspect involves the validity of a rule for car distribution applicable alike to all coal shippers on the line of the defendant and resulting, as we have pointed out, to the benefit of some shippers and to the injury of others. We have found that in the particulars herein explained, discrimination was practiced, and have held that for such damages as resulted the complainant is entitled to

recover from the defendant. As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices, and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the Commission is divided as in the case to which we have just alluded. The majority is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant, that being a judicial question for the courts. At the most any finding by the Commission as to the amount of damages would be the expression of an opinion that could not be enforced by the Commission and would have no conclusive and binding effect upon the court to which, in any event, resort must be had by the complainant for a finding and judgment in the usual manner required by fundamental law. The minority, conceding some of the difficulties to be encountered in dealing with such matters, nevertheless interpret the law as necessarily casting that burden upon the Commission." (Page 371.)

Notwithstanding, however, the view entertained by the majority, awards were made in this and the other cases which were before the Commission because the Commission thought that unless an award were made, the complainants in the case before them would be remediless, due to the fact that the Circuit Court of the United States for the Eastern District of Pennsylvania, before which actions to recover damages would have to be brought, had, in the view of the Commission, held that claims for damages of the character presented in the cases before the Commission would first have to be passed upon and determined by the Commission, the Federal Courts having no primary jurisdiction thereof. The decision to which the Commission had reference was that which had been rendered in the case of the Morrisdale Coal Company *vs.* Pennsylvania Railroad Company, 176 Fed. Rep., 748, which afterwards reached this Court, and is reported in 230 U. S., 304.

While in our judgment the Commission misappre-

hended the effect of the decision in the Morrisdale case, it remains to be considered whether the views of the majority of the Commission are correct as to the extent of the power to award damages which has been conferred upon the Commission by the Interstate Commerce Act. Unquestionably the Commission has been empowered by that act to make awards of damages to shippers injured by violations of the Act, but whether having regard to the general purposes for which the Commission was created, this general grant of power over claims for damages should not be restricted to those which grow out of the rates charged by a carrier is a question as to which opinions may well differ. The majority of the Commission was of opinion that its power should be so restricted, and there is certainly this justification for that view, that where the determination of the amount of damage is dependent upon considerations upon which a jury is as well qualified to pass as the members of the Commission, nothing will be gained by having the amount of the damages determined in the first instance by the Commission, whereas a very different situation is presented when the amount of damages must be determined with reference to the effect of rates which have been charged by a carrier.

And not only would nothing be gained by a determination of the damages in the first instance by the Commission, but it would be a distinct disadvantage both to shippers and carriers to be required to litigate questions of damages in cases of the present character first before the Commission and then practically *de novo* before a jury.

The distinction which the majority of the Commission makes as between damages resulting from payment of rates and damages which have no relation to rates has much to commend it.

Rates of a carrier even though subsequently condemned are binding while they are in force upon both shipper and carrier, and consequently the subsequent condemnation of a rate may not of itself relieve the shipper from its binding effect while it was in force. The question whether the

condemnation should have the effect of securing for shippers relief for the past and consequently reparation for damages sustained as the result of the payment of the rate condemned would seem to be one peculiarly for the determination of the Commission, but no such consideration is involved when the question is whether a shipper should be awarded damages because of a practice or regulation of the carrier providing for the distribution of its cars in times of car shortage which has been declared unlawful by the Interstate Commerce Commission, for the practice or regulation before its condemnation was not, as was the rate, binding upon the shipper, and consequently the intervention of the Commission would not be necessary as it is in a case in which the effect of past rates is involved.

It would not, therefore, be at all inconsistent with the scheme of the Interstate Commerce Act to allow the Courts to deal with claims for damages growing out of the conformity by a carrier to a regulation governing the distribution of its cars during the period preceding the condemnation of this regulation by the Commission, while it would not at all comport with this scheme to permit Courts to entertain actions for the recovery of damages because of the payment of unreasonable or discriminatory rates while these were effective tariff rates.

While it would not be to the interest of the plaintiff in error in the present case to have the power of the Commission restricted in the manner above indicated, resulting, as this would, in a determination that the award with which we are concerned was not one that the Commission had authority to make, we have felt it due to the Court to direct its attention to this feature of the case not only because of the view entertained by the majority of the Commission that the award was one which it had not the power to make, but also because the plaintiff in error is contesting the validity of awards of this character in proceedings which have been brought upon them. It has taken these apparently inconsistent positions because of the doubt as to whether or not awards of this character are valid. If they are invalid, than they ought not to be enforced be-

cause they constitute no defense to actions brought in the Courts in respect to the same subject matter and consequently a recovery of the awards might subject the plaintiff in error to the risk of the payment of double damages.

But if the awards are valid, then they should preclude those who have secured them for endeavoring, as the defendant in error has in the present case, to secure through the medium of the Courts damages in respect to the same subject matter which was covered by and as we submit merged into the award.

MERITS OF THE CLAIM.

The plaintiff in error has not asked this Court to review the case on the merits. It refrained from doing this not because it would not have welcomed such a review, but because a determination of the question whether the defendant in error had not received all the cars it was entitled to at its various mines involved a consideration of a great mass of figures and we did not feel that the burden of doing this should be imposed upon this Court, when relief from the judgment which has been obtained by the defendant in error could be otherwise secured.

Through the action of the defendant in error, however, there has been embodied in the Transcript of Record, portions of the testimony bearing upon what we may designate as the merits of the case, and these portions present a very one-sided view of the subject. All of the Transcript of Record from pages 148 to 270 has relation not to the issues raised by the specifications of error, but to the question whether the defendant in error had been discriminated against by the plaintiff in error in the distribution of its equipment.

In view of this we are perhaps justified in calling attention to what we believe the testimony established on this point.

The charge of discrimination as to the mines of the defendant in error known as Falcon Nos. 2, 3 and 4—and the claim in respect to these mines constituted by far the

larger part of the claim as a whole—was rested upon an alleged over-delivery of cars to the Berwind White Coal Mining Company. The facts as to the distribution made to these three mines of the defendant in error and to the Berwind Mines were embodied in the following point or request for charge which was presented by the plaintiff in error:—

“The aggregate ratings of the Berwind White mines for the period of the action, as shown by the defendant's distribution sheets, amounted, on a wooden basis, to 27,015 cars. The statement prepared by Mr. Chase, a witness for the plaintiff, and put in evidence by the plaintiff, shows that the assigned cars delivered at the Berwind White mines between October 1st, 1905, and April 30th, 1907, amounted, on a wooden basis, to 17,714½ cars. Accepting these figures as correct, the aggregate ratings of the Berwind White mines for unassigned cars were 9300½. The unassigned cars shown by Mr. Chase's statement to have been delivered at these mines amounted, on a wooden basis, to 1998½. The percentage of unassigned cars which the Berwind White Company, therefore, received was equal to 21.3% of their ratings for unassigned cars. The aggregate ratings for the period of the action of Falcon Mines Nos. 2, 3 and 4, as shown by the distribution sheets of the defendant were 5388 cars. They received no assigned cars, and this, therefore, constituted their rating for unassigned cars. Mr. Miller, the superintendent of these mines, a witness called for the plaintiff, stated that the cars received at these three mines during the period of the action amounted to 1715. The unassigned cars, therefore, which these mines received amounted to 31.8% of their rating for unassigned cars, which was 10.5% in excess of the percentage of the Berwind White mines.”

Every statement embodied in this request was justified either by evidence adduced upon behalf of the defendant

in error or by the records of the plaintiff in error showing the car distribution which had been made, the correctness of which were not questioned and which indeed had been given in evidence by the defendant in error.

Accepting the facts stated in this point as correct, the Berwind mines with ratings of 27,015 cars, had received 17,714½ assigned cars (and it was conceded that they were entitled to all of these cars) and 1998½ of the plaintiff in error's cars, while the defendant in error's mines, with ratings of 5388 cars, had received 1715 of the plaintiff in error's cars. The delivery of these 1998½ cars was justified by the system of distribution which the plaintiff in error had in force at the time, but the delivery of all of them would probably not have been justified if the system in force had been that which the Commission subsequently found was the proper one. But upon the assumption that all of these 1998½ cars had been improperly delivered, the plaintiff in error presented another point or request for charge which was as follows:—

“It appears from the distribution sheets of the defendant that for the period of the action the aggregate ratings of all mines in the Tyrone region for undersigned cars amounted, on a wooden basis, to 124,953½, and that the aggregate rating of the Falcon mines Nos. 2, 3 and 4, amounted, on the same basis, to 5388. The ratings of these mines were, therefore, 4.3% of the Region rating for unassigned cars. If, therefore, there were evidence from which the jury could properly find that the defendant should not have delivered the 1998½ cars of its own to the Berwind White Coal Mining Company which were placed at the mines of that company in the period of the action for commercial shipments, the plaintiff was injured because of such delivery only to the extent of 86 cars, as this would have constituted its share of these cars if it had received the number which its percentage of the Region rating for unassigned cars would have entitled it to.”

There was no controversial fact or statement embodied in this point unless the ratings of the defendant in error's mines could be regarded as such, and we trust we have been able to convince the Court that these were not open to question.

A similar condition existed as to the defendant in error's mines Nos. 5 and 6. It was claimed that these mines had suffered because of over-deliveries made to the mines of David E. Williams & Co., but upon the assumption that every one of the plaintiff in error's cars delivered at these mines constituted an over-delivery, the mines of the defendant in error suffered only to the extent of forty-one cars. The aggregate shortage, therefore, of all the defendant in error's mines upon the assumptions that the Berwind and Williams mines should have received none of the plaintiff in error's cars, amounted to 127 cars, while the damages of the defendant in error have been ascertained upon the basis of a deprivation of cars running into the thousands.

We are, of course, aware that what has been said as to the maximum shortage of the defendant in error's mines is inconsistent with the finding of the Interstate Commerce Commission as to the additional number of cars which these mines should have received. Notwithstanding this we are convinced of the accuracy and correctness of the above figures, and of the fact that if the defendant in error should be successful in enforcing payment of the judgment which it has secured, it would thereby obtain an enormous advantage and preference over the other shippers of the plaintiff in error.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.

No. 290.

FILED

MAY 18 1915

OCTOBER TERM, 1914.

CLERK

IN THE
Supreme Court of the United States.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in
Error,

vs.

CLARK BROTHERS COAL MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

REPLY BRIEF OF PLAINTIFF IN ERROR.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1914. No. 290.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Clark Brothers Coal Mining Company.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The serious misstatements and distortions of evidence in the Defendant in Error's Brief require correction not merely in justice to the parties, but to the Court.

RATINGS OF MINES.

At page 7 of the Brief Counsel in effect state that the Interstate Commerce Commission did not deal with the fairness of the ratings given to the defendant in error's mines, but only with the fairness of the plaintiff in error's method or rule for determining the ratings of all mines. A sufficient refutation of this is afforded by the following extract from the report of the Commission:—

"It is not contended that there was any unfairness in the rating assigned to Falcon No. 2 during the period from April, 1904, to October, 1905, when it was being operated by the complainant, W. F. Jacoby & Company. The rating then given to it was 450 tons a day and this the complainant in that case admits was a close approximation of its actual output capacity. It appears, however, that from October, 1905, to May, 1907, when Falcon No. 2 was being operated by the Clark Brothers Coal Mining Company the rated capacity credited to the three Falcon mines was 9 cars or 315 tons for No. 2, 1 car or 35 net tons for No. 2, and 2 cars or 70 net tons for No. 4, making a total capacity of 12 cars or 420 tons for the three mines. In April, 1907, these ratings were increased to 13 cars or 455 tons for Falcon No. 2, 2 cars or 70 tons for Falcon No. 3, and 5 cars or 175 tons for Falcon No. 4, making an aggregate capacity to the three mines of 20 cars or 700 tons daily. The complainant in the second of these complaints, in support of the theory, advanced also in the Hillsdale Coal & Coke Co. *vs.* P. R. R. Co., *ante*, that commercial capacity ought to be eliminated, calls attention to the fact that defendant in its answer admits that during the period in question the actual physical capacity of the three Falcon mines was 709 tons, 144 tons and 270 tons, respectively, or a total of 1133 tons in all, which would require 31.1 cars daily to move. On the other hand it is to be noted that the petitioner in the second complaint contends that the physical capacity of the three mines was only 600 tons, 125 tons, and 300 tons, respectively, or 1025 tons in the aggregate per day. Finally it must be observed that neither of the petitioners made complaint to the defendant, at any time, of the ratings of their mines, and when finally they did complain the defendant accepted their engineer's statement or estimate as to their actual working capacity. *Under*

these circumstances, we see no substantial basis for any finding of discrimination against the complainants with respect to the defendant's ratings of their mines." (Transcript of Record, page 91.)

At pages 10 and 11 of their Brief, counsel call attention to the fact that shortly after the acquisition by the defendant in error of Falcon No. 2 mine, its rating was reduced from 450 tons to 315 tons per day, and a reduction was also made in the rating of Falcon No. 3 mine from 100 tons to 35 tons per day, but fail to call attention to the fact that these reductions came about as the result of the application of a new system of rating common to all mines, and there is not a particle of testimony in the case which tends to establish that this system was not applied to the defendant in error's mines in the same manner in which it was applied to all mines, and this system concededly the Interstate Commerce Commission has sustained as fair.

At page 12 of the Brief testimony of the engineer of the defendant in error Womelsdorf—is referred to which, standing by itself, would give the impression that after it had ceased to be worked the rating of one of the mines of David E. Williams & Company—Urey No. 2—was continued. On cross-examination, however, Mr. Womelsdorf admitted that conditions existed which justified the continued rating of this mine, but defendant in error omits all reference to this part of his testimony. What we refer to, follows:—

"Q. Do you recall testifying to this fact in this Court in an action in which the Hillsdale Coal Company was plaintiff and the Pennsylvania Railroad defendant? 'By Judge Krebs: What about Urey Ridge No. 2? A. Urey Ridge No. 2 was abandoned for the reason they had made arrangements to take the coal remaining out from No. 3 being at a lower level they could better remove it and also some by means of No. 1.' Is that right?

"A. Yes, that is correct." (Transcript of Record, page 270.)

So it thus appeared from the evidence of the plaintiff's own engineer that while Urey No. 2 was abandoned as a distinct operation in the sense that coal was no longer loaded over its tipple, it still continued in operation as a mine, its output being loaded over the tipples of adjoining mines. It was entirely proper, therefore, that its rating should be continued.

Attention is also called in the Brief—page 14—to the fact that the average daily shipments from the Williams mines were but eighteen cars per day, materially less than the ratings which were, it is said, forty-five cars per day, and this fact is cited as proof of overratings.

The volume of shipments establishes nothing, however, as to the capacity of the mines, for this volume was dependent, of course, upon the number of cars received.

In this respect the Williams mines were not different from the other mines shipping over the railroad of the Plaintiff in Error, for the evidence established that the aggregate shipments from all mines were very materially less than their aggregate ratings. On this point Mr. Michael Trump, the General Superintendent of Transportation of the plaintiff in error testified as follows:—

“By MR. GOWEN:

“Q. As a result of the examinations of mines on the lines of the Pennsylvania Railroad Company, which was made by the inspectors who were appointed to examine them for the purpose of determining their maximum capacity, what was found to be the total maximum capacity of the mines in all regions?

“A. I think you have the statement, Mr. Gowen, I prepared on that. May 1st, 1906, 9760 cars of thirty-five net tons capacity.

“Q. That 9760 cars represented the daily physical maximum capacity of the mines?

“A. Yes, sir.

“Q. On the lines of the Pennsylvania Railroad?

"A. Yes, sir.

"By THE COURT:

"Q. That is all of the regions?

"A. All regions, yes, sir.

"By MR. GOWEN:

"Q. How did that compare with the shipments which had been made in the period preceding the examination, the three months period preceding the examination?

"A. The average daily shipments for one year prior to that date was 3317 cars or 34 per cent.

"Q. So that the productive capacity of the mines was almost three times greater than the volume of shipments which had been made by all of the operators?

"A. Yes, sir. At another rating period, May 1st, 1907, the capacity of the regions was 10942 cars of 35 net tons, the average daily shipments for one year prior thereto 3731 cars or 34 1/10 per cent.

"Q. That was the condition that existed at the end of the period of the present action?

"A. Yes, May, 1907." (Transcript of Record, page 66-67.)

It is true that the Superintendent of David E. Williams & Company testified that he thought the ratings of one or two of the mines were somewhat in excess of their shipping capacity, but it was shown by the evidence of the engineer who had examined these mines upon behalf of the plaintiff in error for the purpose of estimating their capacity that this had been arrived at in accordance with the method or system applied at all the mines examined by him for purposes of rating, and that under this method these Williams mines were entitled to the ratings that he had given them.

If the ratings had been determined in accordance with the method applied at all mines—and this was not controverted—if there was any overrating it is fair to assume that this resulted from conditions which doubtless

brought about overrating of the other mines, and thus the Williams mines derived no benefit from any over-estimate of their capacity.

It was not alleged nor was it attempted to be shown that any of the Berwind mines were overrated.

THE DISTRIBUTION OF CARS.

At page 15 of their Brief, counsel call attention to the circumstances which they contend establish the right of the State Court to entertain the action, notwithstanding the proceeding and ruling of the Interstate Commerce Commission which they refer to.

The fact, and the indisputable fact, is that in the present case and in the proceeding before the Commission the defendant in error has recovered damages because of the non-receipt in one and the same period of time, of the cars which the two tribunals respectively held it should have received.

In the proceeding before the Commission the number of cars to which in judgment of the Commission the defendant in error was entitled was determined in accordance with the rule which the Commission said should have controlled the plaintiff in error in the distribution of its equipment, which was contrary to the rule which the defendant in error had in force.

In the present case the number was theoretically, at least, in view of the instructions of the Court, ascertained with reference to the rule of the plaintiff in error which was specifically condemned by the Commission, and which was not even in force during the earlier months of the period embraced in the action.

Indeed, this appears from the Brief of the defendant in error, for at page 15 it quotes the rule condemned by the Commission, and then at page 16 quotes the instructions of the Court to the jury that for the purposes of this case the rule thus condemned was to be considered a fair rule and consequently the controlling one in determining the number of cars which the defendant in error should have received.

Several pages of the Brief are devoted to a reference to testimony bearing upon the relative distribution of cars at its mines and at the mines of the Berwind-White Coal Mining Company and of David E. Williams & Company, the shippers who are alleged to have been preferred in the distribution.

As stated in our main Brief, we have not asked this Court to pass upon the question whether the testimony established the preference alleged. There was a mass of testimony bearing upon this issue, and the Defendant in Error has printed but a small portion thereof, and, in making selection of what to print, it has evidently endeavored to exclude all which militated against its theory.

It has incorporated in the Record computations prepared by it purporting to show the relative deliveries made at its mines and at the mines of the other two companies, but these were shown upon cross-examination of those who had prepared them to be worthless because of their inaccuracies and jugglery of figures, but this cross examination has been omitted.

The table at the top of page 18 of the Brief is an illustration of the methods pursued in these computations. This table purports to show the "Relation of unassigned cars received to ratings" of the mines embraced therein which comprise two of the Berwind-White Coal Company, several of the Williams mines and all of the Defendant in Error's mines.

In ascertaining the respective percentages shown therein, the ratings, or, to be accurate, less than the ratings, of the Berwind and Williams mines were used, while the ratings of the Defendant in Error's mines were ignored and the physical productive capacity thereof used in lieu of the ratings. As this physical productive capacity was about twice as great as the ratings of the mines, the Defendant in Error by using it as a factor in ascertaining the percentages of the car deliveries at its own mines of course largely reduced these percentages.

In another respect this table illustrates the unfairness of the tables or computations of which it professes to be a synopsis.

It appeared from the testimony that the Berwind-White Company was during the period of the action operating five mines which were all in one group, and as a consequence cars delivered at these mines could be used indiscriminately at one or more of them. Under these circumstances the only fair way of determining whether over-deliveries were made at these mines was to consider the deliveries as a whole. In the table to which we have referred two of the Berwind-White mines only are included. The others are omitted because their inclusion would have been hurtful to the Defendant in Error.

Even by confining their figures to but two mines, the defendant in error on its own method of computation is able to show over-deliveries to the Berwind mines in only eight months out of the twelve embraced in the table, and out of the fifteen months embraced in the period of the action.

We do not need a better illustration of the unfairness of segregating the deliveries at the Berwind mines than is furnished by the testimony which is printed in the Defendant in Error's Brief from pages 18 to 24, inclusive. The first part of this testimony deals with the distribution made at the Berwind mines on a certain date, viz, March 7th, 1907. It appears therefrom that one mine, Eureka No. 7, was entitled on that day to one car, and received eleven and one-half, that Eureka No. 27 was entitled to two and received five, and that Eureka No. 28 was entitled to eleven, and received none. Eureka No. 7 and No. 27 are dwelt upon while Eureka No. 28 is ignored. And this was the method pursued by the Defendant in Error in making up its computations or tables of alleged over-deliveries at the Berwind mines. It did put in evidence one table in which it combined the deliveries at all the mines, but in this table, as well as in every other table in which it ascertained the percentages of the car deliveries made at the Berwind and Williams mines, it increased these percentages by using as a factor ratings for the mines materially lower than the actual ratings,

thus making the tables valueless for any purpose. It attempted to justify this action not because of any claim or testimony, so far as the the Berwind-White Company was concerned, that the ratings were excessive, but because the superintendent of the Berwind mines, when questioned as to their ratings, speaking from recollection merely, some years after the period, gave figures as to the ratings which were lower than those which actually prevailed at the time.

Pages 25 to 31 of the Brief are taken up with a comparative statement of the car receipts at the mines of the defendant in error and of David E. Williams & Company for the months embraced in the statement. This statement was presented, as counsel for the defendant in error say, in order that the "favoritism" toward David E. Williams & Company should be "dramatically shown."

We venture to suggest that instead of dramatically showing the favoritism alleged, the statement only serves to accentuate the unfairness and misleading character of the methods pursued by counsel in presenting their case.

Standing by themselves and without any explanation, these figures would tend to show that Williams & Company had been favored, but if they had been accompanied with statements of the facts, an understanding of which is essential in order to determine the evidential value of the figures, it would have been made apparent that they afford no support for the allegation of preferential treatment of the Williams mines.

The facts to which we refer are these:—

The ratings of the Williams mines were more than nine times as great as those of the defendant in error's mines, and the car deliveries consequently should have been more than nine times as great.

In the months embraced in the statement very large numbers of cars of the Philadelphia & Reading Railroad Company were delivered to the Williams mines to be loaded with fuel supply coal of the company owning the cars. These cars had been delivered to the plaintiff in

error consigned to the Williams mines and under the rulings of the Interstate Commerce Commission delivery thereof to the Williams mines was enjoined upon the Plaintiff in Error. And, in addition, the deliveries made at the Williams mines in the months in question also included considerable numbers of the Plaintiff in Error's cars which were delivered at these mines to be loaded with fuel supply coal for its own uses.

Comprised in the deliveries made to the Williams mines in the months in question were distributable cars, but if the statement submitted by the Defendant in Error had dealt merely with these distributable cars, the showing would have been very different, and would not have been helpful to it. And yet it is only with the allotment of the distributable cars that we are concerned.

The statement in question, therefore, is absolutely worthless and does not tend to establish any over-deliveries whatever to the Williams mines.

In connection with this statement the defendant in error calls attention to the fact that it shows that "there were eighty-three days on which plaintiff received no cars whatever and only two on which Williams received none." As we cannot tell on how many days Williams received no "distributable" cars, the defendant in error's criticism to which we have just called attention can have no real significance.

At page 33 of the Defendant in Error's Brief, attention is called to the tables at pages 264, 265 and 266 of the Transcript of Record, and the statement is made that "inspection and study of them prove that upon its own showing, accepting the tables at their face value, the plaintiff in error is convicted of egregious discrimination."

The tables in question are only part of those which were produced by the Plaintiff in Error, but a consideration of the tables at pages 265 and 266, Defendant's Exhibits Nos. 27 and 33, respectively, will demonstrate that they fail entirely to establish the egregious discrimination asserted by the Defendant in Error.

We will not burden the Court with an analysis of these

tables. It will probably suffice to call attention to the fact that the Plaintiff in Error asked the trial Court to instruct the jury that these tables established that the Defendant in Error had received substantially all of the cars which it was entitled to in the period of the action, and while the Court refused to so instruct the jury, its refusal was rested upon the ground not that the tables, if accurate, did not justify such instructions, but that the question of their accuracy was for the jury.

The tables in question demonstrated that the Defendant in Error was not discriminated against in the distribution of the cars which were allotted at all of the mines in the regions in which its mines were located, and the evidence as to the deliveries made respectively to the Berwind mines, the Williams mines and the Defendant in Error's mines further demonstrated that there was no preferential treatment of either the Berwind or Williams mines.

The evidence on this point established that the ratings at the various mines for distributable car allotment, the number of cars delivered and the per cent. which these deliveries constituted of the ratings were as follow:—

	Defendant in Error's Mines.	Berwind Mines.
Ratings.....	5,388	9,300½
Cars Delivered.....	1,715	1,998
Per Cent.....	31.8	21.3
	Defendant in Error's Mines.	<u>Williams</u> Mines.
Ratings.....	1,626	12,292
Cars Delivered.....	567	4,051
Per Cent.....	34.8	31.12

At page 10 of the Defendant in Error's Brief the statement is made that counsel for Plaintiff in Error "strenuously resisted" the incorporation in the Record of pages 148 to 270, and the suggestion is made that the reason for this was their disinclination to be confronted with what counsel call "infallible testimony."

Counsel are drawing upon their imagination when they say that there was any strenuous resistance to the incorporation of the testimony in question. We did oppose the inclusion in the printed Record of the portion of the testimony which the Defendant in Error desired to have inserted therein, not for the reason suggested by counsel, but because we apprehended what has come to pass, viz., that an attempt would be made to construct therefrom a case very different from the actual case as presented by the testimony as a whole.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Counsel for Plaintiff in Error.

No. 290

8
OCTOBER TERM, 1914.

Office Supreme Court, U. S.
FILED
MAR 17 1915
JAMES D. MAHER
CLERK

IN THE
Supreme Court of the United States

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

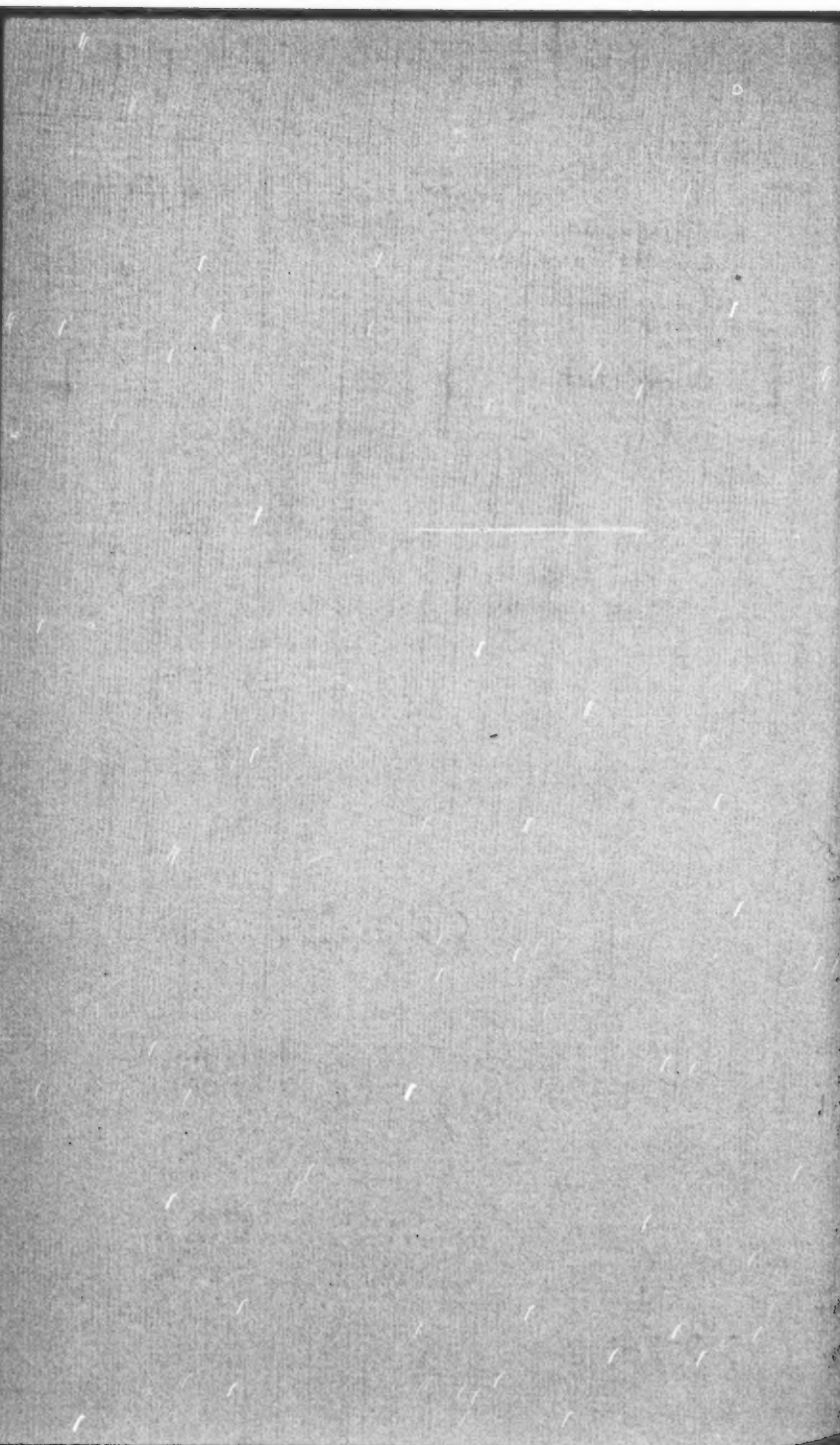
vs.

CLARK BROTHERS COAL MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

A. L. COLE,
A. M. LIVERIGHT,
For Defendant in Error.



SUBJECT INDEX.

	<i>Page</i>
Counter-Statement of the Case	1
Argument	5
The Issues Involved	5
Ratings	7
The Distribution Itself.....	15
The Award Made by the Interstate Commerce Commission is not a Bar	36

LIST OF CASES REFERRED TO

Alabama, Smith vs., 124 U. S., 465,	42
Atlantic Coast Line R. Co. vs. No. Car. Comm'n., 206 U. S., 1,.....	42
Chicago, M. & St. Ry. Co. vs. Iowa, 233 U. S., 334	43
Citizens Bank, New Orleans vs., 167 U. S., 371, 397, ...	40
Commercial Mill Co., Western Union Tel. Co. vs., 218 U. S., 406,	43
Georgia, Hennington vs., 163 U. S., 299,.....	42
Georgia, Wadley Southern Ry. Co. vs., U. S. Adv. Ops., 1914, page 214, 217	43
Hennington vs. Georgia, 163 U. S., 299,	42
Hillsdale Coal & Coke Co. vs. Penna. R. Co., 228 Pa., 61,	38
Iowa, Chicago, M. & St. P. Ry. Co. vs. 233 U. S., 334	43
Jacobson, Wisconsin &c. R. Co. vs., 179 U. S., 287,.....	42
James, Western Union Tel. Co. vs., 162 U. S., 650,	42
Jones, Savage vs. 225 U. S., 501	43
Kentucky, Louisville & N. R. Co. vs., 161 U. S., 677	42
Kentucky, Louisville & N. R. Co. vs., 183 U. S., 503, 518, ..	43
Larabee Flour Mills Co., Missouri Pac. Ry. Co. vs., 211 U. S., 612,	42
Last Chance Min. Co. vs. Tyler Min. Co., 157 U. S., 687, .	40
Lehigh Valley R. Co., Meeker vs., No. 434, Oct. Term, 1914, opinion of Feb. 23, 1915,	39
Louisville & N. R. Co. vs. Kentucky, 161 U. S., 677,.....	42
Louisville & N. R. Co. vs. Kentucky, 183 U. S., 503, 518, ..	43
Meeker vs. Lehigh Valley R. Co., No. 434, Oct. Term, 1914, opinion of Feb. 23, 1915,	39
Missouri Pac. Ry. Co. vs. Larabee Flour Mills Co., 221 U. S., 612,	42
New Orleans vs. Citizens Bank 167 U. S., 371, 397,....	40
North Car. Comm'n., Atlantic C. L. R. Co. vs., 206 U. S., 1,	42
North Dakota, Northern Pac. R. Co. vs., 216 U. S., 579,...	42
Northern Pac. R. Co. vs., North Dakota, 216 U. S., 579,...	42
Patterson Tobacco Co., Richmond &c. R. Co. vs., 169 U. S., 311,	42
Penn Refining Co. vs. W. N. Y. & P. Ry. Co., 137 Fed., 343,	37
Penna. Railroad Co., Hillsdale Coal & Coke Co. vs., 229 Pa., 61,	38
Penna. Railroad Co., Puritan Coal Min. Co. vs., 237 Pa., 453	41

	<i>Page</i>
Puritan Coal Min. Co. vs. Penna. Railroad Co., 237 Pa., 453,	41
Richmond &c. R. Co. vs. Patterson Tobacco Co., 169 U. S., 311,	42
Savage vs. Jones, 225 U. S., 501,	43
Smith vs. Alabama, 124 U. S., 465,	42
Southern Pac. R. vs. United States, 168 U. S., 1, 48,.....	40
Tyler Min. Co., Last Chance Min. Co. vs., 157 U. S., 687...	40
United States, Southern Pac. R. vs., 168 U. S., 1, 48, ...	40
Wadley Southern Ry. Co. vs. Georgia Adv. Ops., 1914, page 214, 217	43
Western N. Y. & P. Ry. Co., Penn Refining Co. vs., 137 Fed., 343,	37
Western Union Tel. Co. vs. Commercial Mill Co., 218 U. S., 406,	43
Western Union Tel. Co. vs. James, 182 U. S., 650,.....	42
Wisconsin &c. R. Co. vs. Jacobson, 179 U. S., 287,.....	42

IN THE
Supreme Court of the United States

OCTOBER TERM, 1914. No. 290.

The Pennsylvania Railroad Company, Plaintiff in Error

vs.

Clark Bros. Coal Mining Company.

IN ERROR TO THE SUPREME COURT OF THE STATE
OF PENNSYLVANIA

Brief of Defendant in Error

COUNTER-STATEMENT OF THE CASE

In October, 1905, and shortly thereafter, the defendant in error, Clark Bros. Coal Mining Co., acquired certain mines in the Clearfield bituminous coal region, Falcon Nos. 2, 3, and 4, on the Tyrone Division, and Nos. 5 and 6, on the Cresson (Cambria & Clearfield) Division. Its competitors and nearest neighbors on the former were the Berwind-White Coal Mining Company, and on the latter D. E. Williams & Com-

pany. Berwind owned five mines and controlled a sixth; Williams operated eight mines. All the mines were on the Pennsylvania Railroad.

Defendant in error brought suit to recover damages (1) because plaintiff in error had failed to furnish an adequate car supply; (2) because plaintiff in error had tortiously discriminated against it in the matter of car service and supply, in favor of its competitors.

The plaintiff in error had in force a system of distribution based in part on ratings it fixed for the various mines. Under said system "assigned" cars were allotted to operators alleged to have the right to them, said cars constituting 72 per cent. of the entire coal car equipment. The remaining 28 per cent. of the equipment, designated as "unassigned," was distributable among all the operators, including those who were favored with assigned cars.

When there was a car shortage among the operators seeking "unassigned cars," the latter were supposed to be delivered on the basis of the ratings, which were founded upon a combination of physical capacity and commercial performance. The more an operator was favored with cars, the better the rating he could get, and the larger the car supply he would consequently receive in periods of shortage. Conversely, the poorer his car supply, the poorer his rating, and the more readily he was crushed.

Between 1905 and 1907, plaintiff in error gave defendant in error's competitors many times their proportionate share of cars. For instance, if there was a general distribution equivalent to 45 3-10 per cent. of the rated capacities of the mines, Berwind would get 400 per cent.; Williams would have his mine sidings replete to overflowing, with receipts several hundred per cent. in excess of his ability to load coal, and of his correct percentage, and the Falcon mines would

receive practically nothing. The percentage would vary, but always the favored operators got many times their proportionate share, at the expense of defendant in error. Plaintiff in error made no pretense to grant defendant in error the same proportion of the unassigned car equipment that it allotted Berwind and Williams. It was inevitable that when the favored ones received far beyond their share, the defendant in error must receive far less than its share.

On the Tyrone Division defendant in error's ratings were arbitrarily kept down, having been inexplicably reduced immediately after defendant in error bought its mines. The disproportionate car supply served to hold these ratings to a minimum. At the same time the Berwind mines were carried on the railroad company's sheets at approximately one-seventh beyond their capacity, and served with equipment to much greater excess.

The Williams mines were carried on the railroad company's sheets at a rating figure 250 per cent. beyond their average daily shipments for the entire period of the action, and at least 20 per cent. beyond their maximum physical productive ability.

For days at a time no cars at all were received at defendant in error's mines, or many of them; and at the very same time the competitors, who also enjoyed the benefit of the "assigned" equipment, received a share and a proportion beyond reason, in the "unassigned" cars.

The plaintiff in error presented elaborate answers in the way of compilations from its sheets, made up in its own offices by its own expert accountants. It was demonstrated that these sheets were not reliable. Cars that the Berwind management testified they had actually shipped were not charged on the sheets. Cars that actual count showed Williams to have gotten were nowhere on the sheets. Tables made up by the accountants were offered to show division, mine and

group car receipts. All of them were based on the erroneous ratings given defendant in error's competitors.

In addition, they were proven untrustworthy by an important statement contained in a letter from the plaintiff in error's Superintendent of Transportation. (Transcript of Record—page 43), which showed from one in authority that in specific months to which he referred the "unassigned" car distribution was 28 per cent. greater than the accountant's tables represented it to be on the ~~Tyone~~ Division, with the discrepancy not so glaring on the Cresson Division.

All the questions of fact involved in the litigation were submitted to the jury under appropriate instructions. The Court charged that equal, ratable car service was what defendant in error was entitled to, and that if the jury found that defendant in error had not been granted equality of service, and the same ratable treatment as its competitors, a verdict might be returned holding plaintiff in error responsible for discrimination. He also charged that if defendant in error had been discriminated against, and had thereby been pecuniarily injured, it might recover damages. The amount of the recovery, under the instructions, was limited to such sum as defendant in error would have made had it enjoyed the same proportionate supply of cars as was granted all the other operators on the division as a whole, including the favored competitors.

The jury found that defendant in error had been discriminated against, assessed its damages at \$41,-481.00, and then trebled the verdict.

At the trial and before the Supreme Court of Pennsylvania the Railroad Company contended that a proceeding before the Interstate Commerce Commission, instituted by the Coal Company, constituted a bar to the action in the State tribunal. Both courts over-

ruled the contention, largely for the reason that the award of the Commission, not reduced to judgment or paid, was only a step toward the ultimate destination and not final.

The Court of first instance, in a careful manner, differentiated the matters cognizable before the Commission and those justicable before it, and took particular pains to see that there was no conflict.

The entire period of the action was one of normal conditions in both trade and transportation lines.

ARGUMENT

THE ISSUES INVOLVED

At the threshold it is important to lay plainly before this Court precisely what the case involves, and what the questions are. To that end reference is first made to plaintiff's amended statement (Transcript of Record, page 22), Sections 5 and 6 of which contain the gravamen of the complaint in relation to Tyrone Division mines and Section 9 as to the Cambria & Clearfield Division mines.

The gist of the charge in Section 5 is that "the defendant company did distribute to the mines of Berwind-White Coal Mining Company, and to Beyer, coal cars in number sufficient to enable them to mine and ship a very large part of their coal and in an amount equal to their capacity, and did deny an equal *pro rata* distribution of coal cars to the plaintiff's mines * * * and did fail, neglect and refuse to render to the plaintiff the same *pro rata* service and facilities that it furnished to said owners and operators * * *."

Violation of the duty of the carrier to render equality of service is also charged.

Section 6 embodies the complaint that the Railroad Company underrated the Coal Company's mines on the Tyrone Division, and kept the rating thereof at a low figure by so distributing cars to it that it was impos-

sible to increase its commercial shipments and physical development.

Section 9 of the statement comprehends chiefly the following complaints relating to discrimination in favor of Williams & Company.

(1) That the carrier "did give said Williams & Co. and the mines by them owned operated or controlled, an inflated rating and a larger proportionate rating than they were entitled to in comparison with plaintiff and its mines; the consequence whereof was that plaintiff failed to obtain the proportionate number of cars to which in right and justice its relative size, capacity and equipment entitled it at the hands of the defendant."

(2) That the carrier "did distribute to the said Williams & Co., and their mines coal cars in number sufficient to enable them to mine and ship a very large part of their coal, and did deny an equal pro rata distribution of coal cars to plaintiff's mines, Falcon 5 and 6."

(3) That the carrier "did deny it transportation facilities in that from the autumn of 1905 to the middle of January 1906, it did spike down the switch connecting the track leading from Falcon 5 and 6 tipple with the tracks of the Horton Run Branch aforesaid."

(4) Irregular, spasmodic and uncertain car supply, causing disorganization of the complainant's force of men, and driving the latter to the operations of its competitors, Williams & Co.

The case in hand presents one of those very clear distinctions indicating the point of departure between matters cognizable by the Interstate Commerce Commission and the Courts. A mass of testimony was taken at the trial, and elaborate calculations were introduced by both sides, the Railroad Company offering

an exhaustive defense on the facts. It would now brush aside the merits of the case, and ask the Court to decide the legal propositions entirely without consideration of the facts. Obviously this cannot be done, as only by an elucidation of the facts can the law be applied.

The case instant is one of pure tort, of wilful, deliberate wrongs practiced against the defendant in error by the carrier. It grows out of matters over which the Commerce Commission would exercise no jurisdiction. These wrongs relate to

(a) *Rating abuses* as a means to effect discrimination in car supply.

(b) Discrimination in such supply, fomented by the rating abuses, and brought about further by wilful failure to distribute cars ratably.

RATINGS

A large proportion of the Railroad Company's brief is devoted to discussing the matters falling within the jurisdiction of the Commerce Commission, and it argues very adroitly that the question of rating has been submitted to the Commission by the Coal Company and decided adversely to it. In support thereof findings of the Commission are exhibited.

Rating is one of the things at the bottom of car distribution by the plaintiff in error, and forms the shield behind which it conceals itself when charged with illegal practices in furnishing or failing to furnish cars.

An examination of the record discloses to the seeker for information that the Coal Company submitted to the Commerce Commission, and the Commission passed upon, the question of the propriety of the *mine rating rule* adopted by the carrier. This rule involved a point in administrative lines precisely for the Commission's consideration. It was promulgated by the

carrier and was presumed to be followed by it. How it observed the rule is another story hereafter to be noted. The rule adopted combined physical capacity of a mine with commercial shipments, the sum of them was divided in half, and the resultant figure used—presumably—as the basis of car distribution for the particular mine involved, in periods of car shortage. Of this rule complaint was made to the Commission, which held that the rule as a rule was unobjectionable, and that complainant's contention that physical capacity alone should govern should be dismissed.

The finding of the Commission, however, was coupled with a very important qualification, and that the whole of this feature of the subject may be in plain view, we quote from the syllabus of the case in which the Commission's opinion was delivered (Transcript of Record, page 96) :

"To the physical capacity of a coal mine the defendant adds its commercial capacity tested by the shipments made from it during the preceding 12 months, and divides the sum by two; these two factors being revised quarterly the mine is thus given a constantly corrected rating in the distribution of coal cars during percentage periods. If this basis is equally applied to all mines served by the defendant the Commission is unable to see that it results in an unequal, unfair, or discriminatory distribution of its equipment".

The gist of the complaint in the State Court, on this phase of the action was not dependent upon the rating rule, but upon its distorted and sinuous application, that is, among other things, upon the failure of the carrier to credit the Coal Company with its actual physical capacity when estimating that factor for the application of its rule, by keeping down the factor of

commercial shipments through failure to furnish cars in which shipments could be made, thus minimizing the factor or making it a nullity, and by carrying upon its distribution sheets the mines of the Coal Company's competitors at large and unwarranted ratings, padded ratings in fact, thus giving them an illegal advantage in the distribution of car supply.

By focusing one's attention upon the extract from the testimony of Mr. Clark quoted at pages 22 and 23 of the brief of plaintiff in error, one gains an entirely inadequate and erroneous impression of the situation.

All the testimony of the witness on the point must be considered, and to that end we here quote the rest of his statement directly in point, to be found at page 155, Transcript of Record:

"Q. You said in answer to a question by Mr. Gowen that you had a quarrel with their system of rating. Will you explain whether it was their system you objected to or the application of the system?

A. *No, sir; we didn't object to the system; but we did object and do object to the manner in which it was applied.*

Q. *State whether, if you had gotten the cars, you would have been able to put your commercial shipments up to your physical capacity?*

A. *Without a doubt.*

Q. *Under those conditions, applying the system the railroad company applied, state whether or not your rating would have been your physical capacity?*

A. *Yes, it should have been.*

Q. *Was there any reason that you can state why your commercial shipments did not equal your physical rating, except the shortage in car supply?*

A. *I know of no reason.*

Q. Did you have the coal to mine?

A. Yes, sir.

Q. Did you have the business on which to ship it?

A. Yes, sir.

Q. Did you have the equipment and the force?

A. Well, we had the equipment. We never had the force.

Q. Why not?

A. Because our men wouldn't stay. We couldn't keep an organization together.

Q. State whether you had reason to believe that, had the car supply been fairly regular, you could have gotten a mine force to mine the coal up to your capacity?

A. I would think so."

Counsel for plaintiff in error strenuously resisted having pages 148 to 270 incorporated in the record, and the reason for their attitude may be conjectured when it is seen that they confront them with such unpalatable testimony as this.

The question of the Coal Company's ratings is extensively discussed at pages 156-159—Transcript of Record—testimony of Mr. Clark, and pages 160-165, Transcript of Record—testimony of Jacob H. Miller, and elsewhere.

From this it appears:

(1) That when defendant in error acquired Falcon No. 2 mine it was rated at 450 tons per diem, and within a few weeks after such acquisition it was reduced to 315 tons.

(2) That at the time of the acquisition of Falcon No. 3 mine, it was rated at 100 tons per diem

and shortly thereafter reduced to 35 tons where it remained for a year.

(3) That for a year Falcon No. 4 was rated at 70 tons, and finally the Coal Company succeeded in getting it doubled after very persistent exertions.

That these ratings were notoriously juggled to the detriment of defendant in error is copiously demonstrated.

Just at the close of the period of the action, April 18, 1907, effective as of a later date, the railroad company admitted that Falcon No. 2 should have been credited with a physical capacity of 709 tons a day, and raised the rating to 13 cars, or 455 tons, notwithstanding the car supply was notably deficient and had given plaintiff no chance to enlarge its shipments. It is in the proofs that *during the entire time* this mine was able to produce as much coal as when the observation was taken, resulting in the 709 tons credit, and the fact is undisputed.

Falcon No. 3 affords another striking example of the inequity with which the rating system was applied. It had a credit of 100 tons a day when the combination system was put into effect. Had it never shipped a pound of coal, it was bound to get a rating of 50 tons. It actually was given one of 35 tons. Taking the case in the most favorable aspect in which it can be presented for defendant below it is convicted of putting plaintiff below to rank disadvantage.

This position is supported by the testimony introduced by plaintiff in error, to wit, the supplemental report of the Interstate Commerce Commission (Transcript of Record, page 86), in which the output capacity of the Coal Company's mines is specified, and by which the claim of said Company is limited in this case.

Turning our attention to the other branch of the rating question, the favoritism bestowed on competitors of defendant in error under the cloak of the rule, we first refer to Falcon No. 5 and No. 6 of the latter, situated in Indiana County. Williams & Company, (with whom a son of a former president of the Pennsylvania Railroad Company was associated) operated or controlled groups of mines known as the Urey Ridge and Glenwood. In 1905 Urey Ridge mines 2, 3 and 5, were given a rating on the distribution sheets of the defendant. Urey No. 2 was carried at 250 tons per diem, although it had been exhausted for years, with the exception of a few pillars, and had been abandoned (Testimony of P. E. Womelsdorf Transcript of Record, pages 267 to 271). We quote the following:

By Mr. Gowen, (page 269).

"Q. 2, 3 and 5 are still working, aren't they?

A. I can't speak as to just this date, *but No. 2 couldn't be working, it wasn't working at that time, it died in 1904.*"

In November 1905, this Urey No. 2 operation, which had been unlawfully carried at 250 tons, was merged on the sheets with No. 3 and No. 5, and the rating of the combined mines was shown as 500 tons (G. E. Oler, Transcript of Record, page 264).

The further history of the point then appears from the testimony of Mr. Oler, a witness for the Railroad Company, as follows:

"Q. Prior to that date what was the rating of 3 and 5?

A. The rating of 3 and 5 was 20 cars, 500 tons.

Q. As of what date?

A. Prior to November 4, while the operation known as 3 and 5, and known as 2, 3 and 5 after November 4th, had a rating of 20 cars up until

December 1st, when a new sheet went in, when it was given as 22 cars.

Q. 22 cars?

A. A new issue of the sheet December 1st, 1905, yes, sir.

Q. Of what size—how many tons each?

A. December 1st of 35 tons.

Q. That is to say, the first change made in these ratings after Urey No. 2 was combined with 3 and 5 showed an increase from 500 to 770 tons?

A. Yes, sir."

In other words, by reason of the exhaustion of No. 2 mine, it was in November, 1905, combined with Nos. 3 and 5, and the combination credited with a rating of 500 tons. In December, 1905, when a new rating sheet went into effect, based on the new rules, this abandoned mine was restored to better than full standing, and these three mines were credited with 770 tons rating.

This instance emphasizes the inequity of the *application of the rule*, because Williams thus received cars in such flood that he couldn't find storage space for them (testimony of Thomas Bryson, pages 210 and 211,) and thus was able to develop a large commercial trade, while Clark was unable to develop the commercial factor made one of the integral features of the rating.

Further light on this point is gained from the testimony of A. M. Riddle, Superintendent of the operating Company. Mr. Riddle stated that the Urey and Glenwood mines combined were accorded a total rating of 45 cars (Transcript of Record, page 213); that they could load only 35 to 40 cars (Transcript of Record, page 214); that the Urey mines listed at 22 cars part of the time and 23 the remainder would be properly rated at 18 cars (Transcript of Record, page 218); and that the average shipments from these mines,

rated at 45 cars a day, were as follows (Transcript of Record, pages 213 and 214) :

1905	November,	16 cars a day			
	December,	21	"	"	"
1906	January,	18 plus cars a day			
	February,	14 cars a day			
	March,	22	"	"	"
	August,	10	"	"	"
	September,	13	"	"	"
	October,	11	"	"	"
	November,	10	"	"	"
	December,	27	"	"	"
1907	January,	24	"	"	"
	February,	19	"	"	"
	March,	22	"	"	"
	April,	23	"	"	"

It thus appears that during the period of the action these mines shipped an average of less than 18 cars a day; but through the manipulation and inequitable application of what might in itself be a correct rule, they got a paper credit for 45 cars; that cars were distributed to them on the basis of their illegal rating to the point of congesting the Railroad Company's own tracks to hold the surplus, rather than let defendant in error, the plaintiff below, have a supply with which to enlarge its factor of commercial performance and thus improve its rating.

THE DISTRIBUTION ITSELF

(a)

What was submitted to the Interstate Commerce Commission as to the car distribution was a rule in force with the Pennsylvania Railroad Company which the defendant in error in this case there claimed was discriminatory. That was the procedure prescribed by this Court in the Abilene case and the Illinois Central case, where a regulation duly promulgated was to be attacked. It was a purely administrative question requiring for its determination the superior knowledge of a board of experts, and demanding uniformity of construction such as the Commerce Commissioners alone could give. This rule is to be found in substance in the opinion of Commissioner Harlan (Transcript of Record, page 99) and verbatim in the testimony of M. Trump, (Transcript of Record, page 64).

As to it the Commission decided—we quote from the head—note to the opinion (Transcript of Record, page 96) :

“That the defendant’s rule, providing that the capacity in tons of * * “assigned” cars shall be deducted from the rated capacity of the mine receiving them and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all “unassigned” cars, is unlawful and discriminatory.”

In a supplemental report filed, to which plaintiff in error has frequently referred in its brief, the Commission has awarded damages to the Coal Company for losses sustained through a car supply found to have been *diminished by virtue of the existence of the opprobrious rule.*

The case in hand is an entirely different proposition,

and has nothing to do with the existence or non-existence of the offensive rule. It relates purely and simply to tortious and illegal conduct of the carrier, assuming the rule to be unobjectionable for the purposes of the case. The issue is most readily grasped by first referring to Exhibit No. 27 of plaintiff below (Transcript of Record, page 41), a letter from Superintendent Trump to Mr. Clark, wherein the former explains (top of page 43) that 72 per cent. of the car equipment plying on the Tyrone Division comprised "assigned" cars and 28 per cent. "unassigned" cars. In 72 per cent. of the car supply defendant in error did not participate.

The controversy in the case at bar turns upon the tortious distribution of the "unassigned" cars, that is to the 28 per cent. of the carrier's equipment.

To bear out the correctness of our assertion, we refer to the trial Court's charge to the jury (Transcript of Record, page 278). He refers at some length to the distribution rule that had been submitted to the Commission for its consideration, and then says:

"For the purposes of this case it may be considered that it was a fair rule of distribution
* * *"

Practically all the Courts, and the Commissions endowed with authority, have held the law to be that the shipper is entitled not only to a relatively equal, or justly ratable use of the facilities of a carrier, but also to the assurance that "no one else shall fare ratably better than he does at the hands of the carrier".

In the Tyrone region the competitive Berwind mines were within a stone's throw of the large operation of the defendant in error. They were substantially within sight of each other. It was demonstrated to a certainty that Berwind's Eureka 7 and 27 were treated ratably far better as to "unassigned" cars. Mr. E. B.

Chase, sales manager for Berwind was put on the stand (Transcript of Record, page 181), and gave a statement of the shipments of his company, dividing them into assigned cars and system (unassigned) cars. The Berwind cars were reduced to terms of tons by an accountant. The same course was followed as to the Falcon mines. The ratio of ratings for unassigned cars to such actually received was then computed. The result showed the extreme ratable inequality with which plaintiff below was treated.

Reference to the lower table (page 237—Transcript of Record) and to Exhibit No. 33 (page 238—Transcript of Record) shows the relation as to Eureka 7 and 27. Similar tables as to the Falcon mines appear in Exhibits No. 38 and 39 (pages 240 and 241—Transcript of Record), the former based on the rating actually given plaintiff below by the railroad company, and the latter on the rating to which it was entitled according to the evidence.

Taking the month of February, 1906, as a specific instance Eureka No 7 received unassigned cars to 219.7 per cent. of its rating for them; Eureka No. 27's proportion received was infinity, that is it had no rating at all for the unassigned cars it received, its capacity having been consumed with assigned cars; Falcon mines, according to Exhibit No. 39, received but 23.1 per cent. of their real rating in unassigned cars.

For the same month (Exhibit No. 40—page 242, Transcript of Record), the Glenwood mines of Williams & Company on the Cambria & Clearfield Division received 57.7 per cent. and Falcon No. 5 (Exhibit No. 41—same page) but 30.4 per cent.

A comparative table compiled from the several exhibits is subjoined, the words "all over" in the exhibits indicating that the mine had no rating left for cars it received in the particular month, and being synonymous with "infinity".

RELATION OF UNASSIGNED CARS RECEIVED TO RATINGS.

1906	Eureka 7	Eureka 27	Falcons Glenwood		
			2, 3 & 4	Coal Co.	Fal. 5
January	Infinity	Infinity	16.1	37.1	
February	219.7	Infinity	23.1	57.7	30.4
March	Infinity	Infinity	14.6	64.5	30.7
August			14.6	38.7	26.7
September	11.7	12.3	15.5	51.3	3.3
October	1.8		14.2	53.2	17.3
November			16.6	48.9	17.9
December	76.6	63.5	15.3	59.5	24.6
1907					
January	88.	56.1	21.6	100.	27.3
February	40.	53.7	18.5	40.9	20.6
March	212.2	508.	20.3	61.7	25.
April	39.3	68.	25.7	73.	41.

The accuracy of the basic figures for these tables is vouched for by the testimony of W. R. Cameron, the Berwind superintendent, as to the Eureka mines. It is to be found at page 179—Transcript of Record.

In concrete form the extent of the discrimination against the defendant in error in favor of Berwind, is well shown in the testimony, upon cross-examination of Mr. Oler, one of the Railroad Company's own witnesses (Transcript of Record, foot of page 254 to top of page 258.) We quote therefrom.

"Q. Now get your sheets for March, 1907.

What is the distribution on March 7th, commercial cars to Eureka No. 7?

A. Seven hoppers and three steels; total of 11 1-2 cars.

Q. How many was it entitled to on its rating?

A. It was entitled to one car.

Q. And got 11 1-2?

A. 10 1-2 excess.

Q. Eureka 16?

A. Eureka 16 got two hoppers and two steels; total 5.

Q. How many was it entitled to?

A. Entitled to two.

Q. Eureka 27?

A. Eureka 27 received five and was entitled to two; excess, three. Eureka 28 was entitled to eleven and short eleven.

Q. Eureka 7, 16 and 27 received from 500 to 1000 per cent more than they were entitled to, didn't they? Answer the question and don't worry about Eureka 22 or 28. They will take care of themselves?

A. About 200 per cent more.

Q. Only 200 per cent?

By MR. BIKLE:

Q. How many cars?

A. It is 21 1-2 cars they received.

By MR. LIVERIGHT:

Q. 21 1-2 cars received?

A. 21 1-2 cars received.

Q. Entitled to 5?

A. Entitled to 5.

Q. That is about 400 per cent, isn't it, more than they were entitled to?

A. Yes, sir.

Q. What was the distribution for the day in the region?

A. 45 30-100.

Q. 45 30-100 per cent, and when the average general operator was getting 45 30-100 per cent of his distribution Berwind was getting 4 to 500, wasn't he, at these mines?

A. Yes, sir.

Q. Now how many did Falcon 2, 3, and 4 get that same day?

A. Falcon 2 didn't get any.

Q. Falcon 3?

A. Falcon 3 didn't get any.

Q. Falcon 4?

A. None.

Q. How many cars on March 16th was Eureka 27 entitled to?

A. Entitled to 1.

Q. How many did it get?

A. Got 3, excess 2.

Q. How many was Eureka 28 entitled to-

A. Eureka 28 entitled to none, received 7, excess 7.

Q. Now these two mines were entitled to 1 between them and they got 10, didn't they?

A. Yes, sir.

Q. That is, they got 1000 per cent of their deserts that day?

A. But was probably making up some shortage.

Q. I am asking about these mines?

A. Yes, sir; they did.

Q. What was the general distribution that day?

A. 22 25-100 per cent.

Q. How many cars that day did Falcon 2, 3, and 4 get?

A. Well, I suppose they didn't get any.

Q. Why, of course?

A. That is why he is asking. Falcon 2 received none and was entitled to 2 short 2. Falcon 3 and 4 received nothing. They were entitled to a car and a half between them.

Q. And didn't get any?

A. No, sir.

cent distribution when Berwind and some other operators get 1000 per cent?

A. No, sir; not so easy. The fact remains they only had 22 25-100 per cent, no matter who got the cars.

Q. No matter who got the cars?

A. They had that percentage, no matter who got the cars, that is all they had to distribute that day.

Q. But Berwinds got a great deal more on that day?

A. Yes; a distribution of equal to 62 cars. That was the distribution for that day.

Q. 62 cars?

A. 62 cars.

Q. And Berwind got 10 of them and they were entitled to one: is that it?

A. Just wait one-half minute.

Q. You want to correct that, do you?

A. No, I don't want to correct it.

Q. Or revise it?

A. That is all.

Q. You have nothing further to say about that day?

A. About that day, no, sir.

Q. The cars remain fixed at 62, do they?

A. Oh, yes.

Q. They haven't varied since you looked at the sheets again?

A. No, not in that short a time.

Q. Now take March 19, Eureka 28 was entitled to how many?

A. Entitled to 7.

Q. And got how many?

A. 27 1-2. 20 1-2 excess.

Q. Get April now, 1907?

A. Just wait till I have a look here, if you please.

Q. You are satisfied?

A. I am satisfied you got your share all right. April, 1906?

Q. 1907. How many cars was Eureka 7 entitled to on April 17th?

A. Entitled to 3 1-2.

Q. How many did it get?

A. 10 1-2, excess 7.

Q. What was the general distribution for that day?

A. The other Berwind mines were 9 short.

Q. Even so what was the general distribution?

A. 45 63-100 per cent.

Q. When there was 9 short at the other mines they got twice as large a percentage of cars as the general distribution?

A. Not considering the Berwinds as a whole.

Q. As a whole?

A. No, sir.

Q. Figure it out?

A. They got twice as many cars as the distribution entitled them to.

Q. As the general distribution for the day. Didn't they get about 90 per cent of what they were entitled to?

A. 7 over and 9 short. That would leave them a shortage of 2 combined.

Q. Then they got about 90 per cent, didn't they, of their share?

A. No, sir; he only got 45 63-100 per cent.

Q. Are you sure of that?

A. Yes, sir.

Q. Don't you know that is just the general distribution in the district, not what Berwind got?

A. Berwind would have to get his proportion of 45 per cent in the district.

Q. Not necessarily. If Berwind got 80 per cent

Falcon got 20 per cent, it might average up?

A. But I understood you to say what per cent Berwind got.

Q. Yes, I am still asking that question. How many unassigned cars was he entitled to that day?

A. He was entitled to 12.

Q. And he got 10 1-2?

A. Got 10 1-2.

Q. Now what percentage is that?

A. 80 or 90 per cent.

Q. The general distribution was 45 63-100, wasn't it?

A. Yes, sir.

Q. Somebody must have gotten a good deal less than 45 63-100 to equalize?

A. Somebody, yes, sir.

Q. Take April 19th?

Mr. GOWEN: One question I want to ask just there.

Mr. LIVERIGHT: Now we object to the interruption of the cross-examination.

Q. Turn back to the 18th. How many cars was No. 7 entitled to that day?

A. Entitled to one.

Q. How many did it get?

A. Received 4 1-2, excess 3 1-2.

Q. How many was 28 entitled to?

A. 28 was entitled to 7 1-2 cars, received 20 1-2, excess 13.

Q. That is, it got 20 1-2?

A. Yes, sir.

Q. And it didn't order that many, did it?

A. Well, it ordered 24.

Q. Ordered 17, didn't it?

A. Ordered 24. 7 charged against the rating would leave 17 rating for unassigned.

Q. It ordered 17 against the unassigned rating?

A. They ordered 24, but we took off 7.

Q. That left 17 for unassigned?

A. Yes, sir.

Q. Against that 17 it got 20 1-2?

A. Yes, sir.

Q. That same day the region distribution was how much?

A. 44."

(b)

As to the Williams & Company mines in Indiana County the favoritism is dramatically shown in the testimony of Thomas Bryson, pages 200 to 211, Transcript of Record. Bryson made an actual count of the cars furnished respectively to the Williams and Clark interests, going to the sidings and jotting down the car numbers. A summary compiled from his testimony is subjoined.

Comparative Car Receipts of D. E. Williams & Co. and
Clark Bros. Coal Mining Co.

	Williams	Clark
1906		
March		
13	33	0
16	29	0
21	9½	0
22	19	0
23	9	0
26	18½	0
October		
11	4	0
12	5	0
13	0	0
15	6	1½
16	7½	0
17	10½	1½
18	10½	1½
19	10	3
20	15½	4½
21	19½	6
23	24	1½
24	9	1
25	7½	1½
26	34½	1½
27	10	0
29	21	3
30	22½	6
31	30	3

November	Williams	Clark
1	$21\frac{1}{2}$	$11\frac{1}{2}$
2	16	2
3	$13\frac{1}{2}$	0
5	$21\frac{1}{2}$	0
6	6	3
7	$12\frac{1}{2}$	2
8	$18\frac{1}{2}$	3
9	$4\frac{1}{2}$	1
10	$3\frac{1}{2}$	0
12	3	0
13	16	3
14	8	1
15	3	0
16	2	0
17	3	0
18	$7\frac{1}{2}$	3
19	$16\frac{1}{2}$	2
20	$17\frac{1}{2}$	3
21	$4\frac{1}{2}$	0
22	$7\frac{1}{2}$	0
23	21	$4\frac{1}{2}$
24	$7\frac{1}{2}$	3
25	$19\frac{1}{2}$	3
26	24	6
27	25	1
28	$10\frac{1}{2}$	0
29	$9\frac{1}{2}$	0
30	$4\frac{1}{2}$	0

December	Williams	Clark
1	11	1
2	13	2
3	$16\frac{1}{2}$	$1\frac{1}{2}$
4	$18\frac{1}{2}$	2
5	27	2
6	21	2
7	14	0
8	$24\frac{1}{2}$	$1\frac{1}{2}$
9	$31\frac{1}{2}$	2
10	41	6
11	$32\frac{1}{2}$	1
12	$31\frac{1}{2}$	7
13	$7\frac{1}{2}$	7
14	$41\frac{1}{2}$	$4\frac{1}{2}$
16	29	3
17	28	4
18	17	0
19	8	0
20	3	0
21	14	0
22	$31\frac{1}{2}$	2
23	$37\frac{1}{2}$	6
24	$22\frac{1}{2}$	0
26	21	0
27	23	0
28	33	$2\frac{1}{2}$
29	14	0
30	19	5
31	$44\frac{1}{2}$	6

	Williams	Clark
1907		
January		
2	22	0
3	18½	0
4	28	5
5	17½	3
6	10½	0
7	37	7½
8	23½	6
9	20	3
10	15	5½
11	45	7½
12	24	0
13	15½	0
14	36½	0
15	33	4½
16	33	0
17	20½	2
18	29	0
19	21	3
21	30½	2
24	16	4½
25	24	0
26	7½	4½
27	33	0
28	29	3
29	7½	0
30	13	0
31	37	0

	Williams	Clark
February		
1	15	0
2	8	3
3	20	0
5	38	0
6	28½	3½
7	11½	1½
8	16½	0
9	20½	3
10	31½	3
11	9½	0
12	22	0
13	26½	3
14	18½	0
15	3	0
16	44	6
17	25	0
18	29½	4½
19	15½	1½
20	44½	4½
21	20	4½
22	36½	3
23	24½	0
24	22½	7½
25	39	0
26	0	3
27	43½	0
28	23	0

	Williams	Clark
March		
1	31	$1\frac{1}{2}$
2	36	0
4	$38\frac{1}{2}$	$4\frac{1}{2}$
5	$32\frac{1}{2}$	2
6	$19\frac{1}{2}$	3
7	$25\frac{1}{2}$	0
8	28	$4\frac{1}{2}$
9	14	$4\frac{1}{2}$
10	$10\frac{1}{2}$	0
11	$33\frac{1}{2}$	$4\frac{1}{2}$
12	12	$4\frac{1}{2}$
14	12	$4\frac{1}{2}$
15	30	$4\frac{1}{2}$
16	$37\frac{1}{2}$	0
17	$28\frac{1}{2}$	0
18	45	6
19	31	0
20	29	0
21	17	3
22	16	$7\frac{1}{2}$
23	$11\frac{1}{2}$	0
24	$25\frac{1}{2}$	0
25	28	$4\frac{1}{2}$
26	$40\frac{1}{2}$	6
27	$38\frac{1}{2}$	0
28	$10\frac{1}{2}$	0
29	9	0
30	4	0
31	21	7

	Williams	Clark
April		
1	9	0
2	31	0
3	6	2
4	12	3
5	16	4½
6	26½	0
7	25	0
8	10	0
9	28	4½
10	22	3
11	37½	0
12	26½	3
13	61	0
15	31	9
16	40	4½
17	44	4½
18	37½	4½
19	36	0
20	29½	7½
22	55	4½
23	28	3
24	8½	0
25	25½	0
26	26	4½
27	30	0
28	22½	6
29	14	0
30	18½	0

During the entire period in which a daily count was made, above summarized, there were 83 days on which plaintiff received no cars whatever, and only 2 on which Williams received none.

A comparison of the *correct ratings* of the Williams mines with the rating of Falcon's No. 5 and 6 shows that the car supply to Clark Bros. Coal Mining Company was outrageously deficient not only from an absolute standpoint, as the tables just presented eloquently prove, but relatively as well; while a scrutiny of the shipment tables compiled from the testimony of Mr. Riddle and hereinbefore submitted makes clear that the injury to Clark was wrought by according cars to Williams day by day in greater quantity than he could load and ship. So intent was the carrier upon carrying out its preferential scheme that it permitted the outraged operator to go for days at a time without a car, while the favored one had equipment lying idle on the tracks through a congestion of facilities that he was unable to load.

(c)

The railroad company, to the allegations of the defendant in error, offered an elaborate defense. It contended that, even though, comparatively, the favored operators received a much larger share of cars than Clark Bros. Coal Mining Co., the basis of comparison was not correct. To prove its contentions it produced its own records—whose accuracy was impugned by some damaging testimony—and thereby showed that the Tyrone Division distribution as a whole was not so large relatively as the figures offered by the Coal Company as to Berwind, nor the Cambria & Clearfield Division figures as a whole relatively so large as would be inferred by the comparison between Williams and Clark. That is, it presented tables to show that com-

paring Clark with the Division distributions, the disparity was considerably less than by confirming the comparison to the favored operators alone; and contended that no recovery could be had based merely on the individual comparisons. The tables produced by the carrier in making out this defense will be found at pages 264, 265, 266—Transcript of Record. Inspection and study of them prove that upon its own showing, accepting the tables at their face value, the plaintiff in error is convicted of egregious discrimination.

The theory intended to be invoked by the carrier was, however, adopted by the trial court, leaving the jury to pass upon the merits of the figures, and thereby plaintiff achieved a substantial victory as to the quantum of damages.

To bear us out in our assertion we refer to the points submitted by the defendant in error in its requests for charge at the trial of the case. The one involved is point number 9, page 287—Transcript of Record. The Court there adopted the limit of recovery contended for by the Railroad Company. The point is herewith appended:

"9. The measure of plaintiff's damages would be the reasonable profit upon the coal it could and would reasonably have shipped, in addition to what it did mine and ship, if given the same pro rata of unassigned cars as its said competitors were given, on days that it was not given such percentage".

That is refused as stated, for the reason that it leaves out of consideration the rights of other shippers, and the rule alternatively presented by counsel is affirmed, which reads as follows:

"The measure of plaintiff's damages would be its reasonable profit upon the amount of coal plaintiff could and would reasonably have shipped in addition to what it did mine and ship if given

the same pro rata of unassigned cars as its said competitors were given on days that it was not given such percentage, and provided, that thereby no other shipper on the same Division would have received less than the general average of unassigned cars for distribution on that Division. If, to have given the plaintiff the same percentage of unassigned cars as its competitors named in the case, would have resulted in according more than the general average for distribution out of the general pool of unassigned cars, the recovery of plaintiff should be limited to its distributive share in such pool from day to day upon such a mine rating as the jury find plaintiff should have had under all the evidence."

Affirmed.

(d)

In the brief of plaintiff in error four pages are devoted to a discussion of the merits of our claim—the last four in the book. They relate to disputed propositions of fact, the truth of which must have been for the jury to determine. It is noteworthy that the points quoted at pages 46 and 47 of the brief *form no part of the transcript of record* in this Court, and we might dismiss them with that comment.

Assuming, however, that the whole record is at the disposal of this Court, if it wishes to make use of it, we shall in very brief manner answer the argument of counsel.

At page 46 of the brief will be found Point 17 of the Railroad Company, as it was presented at the trial, and at page 47, Point 18 is quoted. These points are based entirely on the absurd proposition that the Coal Company was entitled only to a fractional share in the numerical excess of cars the carrier avers it accorded Berwind and Williams, as represented by defendant

in error's ratings on the carrier's records. The untenable character of the proposition has already been demonstrated in this argument, and we merely repeat the maxim laid down by all courts and commissions that the shipper is entitled to the assurance that "no one else shall fare ratably better than he does at the hands of the carrier."

The impossibility of affirming the points as offered lies in the following:

(1) They are founded upon the distribution sheets which the testimony shows to be unreliable and untrustworthy.

(2) The favored operators were not charged on the sheets with all the cars delivered to them.

Calling attention to a few of the specific defects in the points as drawn, we find the following objectionable features:

17th point:

(a) The period is taken as a whole instead of day by day or month by month.

(b) The *correct* number of unassigned cars delivered is 2029½.

(c) The evidence of Mr. Chase did not show the rating of Berwind for unassigned cars as stated. His testimony made no reference to such subject.

(d) Plaintiff in error's exhibit No. 28 gives the Berwind rating for unassigned cars as 4708½. He received 2029½. If the exhibit is correct Berwind got 43 per cent of his rating, and not 21.3 per cent as assumed in the point.

18th point:

(a) The period is taken as a whole.

(b) There was nothing before the trial court, summarizing the aggregate ratings of the Tyrone region for unassigned cars during the period of the action.

Controversial matters certainly could not be embraced in points for charge, with the expectation that such points could be affirmed.

THE AWARD MADE BY THE INTERSTATE COMMERCE COMMISSION IS NOT A BAR.

It is well to know what the Interstate Commerce Commission passed upon in the case of Clark Brothers Coal Mining Company vs. Pennsylvania Railroad Company, to aid in considering the alleged bar set up by the defendant below.

Reference to the order of that body (page 94, Transcript of Record) shows its legal finding to be as follows:

"These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation and practice, in distributing coal cars among the various coal operators on its lines for interstate shipment during the percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars and system fuel cars in the record

herein referred to as 'assigned cars', from the rated capacity in tons of the particular mine receiving such cars, and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned' cars:

It is ordered that the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complaintants and other coal operators similarly situated, and is in violation of the third section of the act to regulate commerce."

It is immediately apparent that, notwithstanding the matters that may have been brought to the attention of the Commission, *only those over which it felt it had authority were determined*. The system of rule or distribution which gave "assigned" cars recipients an undue advantage was under fire, and was condemned; and damages were later awarded "in respect of the matters and things in said report found to be discriminatory."

Section 9 of the Interstate Commerce Act relates to such matters as are exclusively cognizable by a Federal tribunal, be it Court or Commission; and does not in the slightest degree undertake to restrict State jurisdiction. All it lays down is that a suitor having a right of action through injury due to violation of the "Act to Regulate Commerce," must resort either to the Commerce Commission or to a Federal Court. By the amendment of 1910, the State Courts are given jurisdiction to entertain suits upon an award of the Commission, and *it is quite plain that the policy of the law has been to enlarge and not to restrict State jurisdiction*.

The case of Penn Refining Company vs. W. N. Y. & P. Ry. Co., 137 Fed., 343, is not in the least apposite. All that is there determined is that in a suit to enforce

payment of an award of money damages by the Commission, the suitor cannot depart from the award and introduce a new action for damages that originally might have been presented in Court.

The contention is decided adversely to plaintiff-in-error in *Hillsdale Coal & Coke Company vs. Pennsylvania Railroad Co.*, 229 Pa., 61.

An attempt is made to draw a distinction between the situation in that case and the one in hand, because an unexecuted award has been made by the Commission. Even if the cause of action in the two cases were the same, there would be no force in such a proposition. We know of no authority which holds that an award of an administrative body or tribunal is a bar to an action in court. The Commission's award in many respects is advisory in nature, and to give it life requires prosecution in a Court. It will be interesting to see how plaintiff-in-error will treat the same question in actions brought to enforce the awards of the Commission. In the case instant it frankly argues to the Court that it is on both sides of the question; and we respectfully submit that its doubts and uncertainties are the result, not of inherent difficulty in the problems presented, but because of the Railroad Company's refusal to distinguish between the matters duly cognizable by the Commission and those properly presentable in a Court.

Although it does not conclude the question, it is interesting and worth while to note how the limitations that encompass the Interstate Commerce Commission are regarded by that tribunal itself. Its definition of its own status is in entire accord with the proposition we have made, that a proceeding before the Commission, though prosecuted to an award, is in no sense a legal bar. In

15 I. C. C. R., 147 (1909)

the Commission plainly stated that its order for the

payment of money *did not have the effect of a judgment of the Court*; that such orders were not enforceable by process, nor did they become liens upon the property of a defendant.

Judson on Interstate Commerce (2nd Ed.),
page 489.

How then can plaintiff-in-error successfully invoke the principle of *res judicata*, bar or estoppel, because of an award by the Commission which it makes no pretense of intending to pay until legally enforced in the Courts?

The question always is whether a party has had his day *in Court*. To constitute the day in Court there must be a *final judgment*. The Commerce Commission cannot give judgment, therefore its findings do not constitute a bar.

However, the whole subject seems to be effectually disposed of by this Court in the recent case of

Meeker vs. Lehigh Valley R. R. Co., No. 434
Oct. Term, 1914,

(Opinion of February 23, 1915).

in which the office of the findings and award of the Commission is directly involved. Discussing the point the Court says:

"It is also urged, as it was in the Courts below, that the provision in Section 16 that, in actions like this, 'the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated', is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

"*This provision only establishes a rebuttable*

presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues and takes no question of fact from either court or jury. *At most, therefore it is only a rule of evidence.* * * * * In principle it is not unlike the statutes in many States whereby tax deeds are made *prima facie* evidence of the regularity of all proceedings upon which their validity depends."

It will hardly be contended seriously that an order of the Commission which merely establishes a rebuttable presumption constitutes a bar.

The elemental principle governing the question is thus stated:

"It must appear that *judgment* was rendered upon a *legal trial of the action*, or at least a full opportunity for such trial, involving a consideration of the merits of the case, and settling the issues alleged to be concluded by it by a *judicial decision* entered either on the finding of the Court, the verdict of the jury, or notwithstanding the verdict."

23 Cyc., 1226.

This principle has been recognized and adhered to in a multitude of decisions of this Court among which it is sufficient to refer to

Southern Pacific R. vs. United States, 168 U. S., 1, 48.

New Orleans vs. Citizens Bank, 167 U. S., 371, 397.

Last Chance Min. Co. vs. Tyler Min. Co., 157 U. S., 687.

ness by the plaintiff-in-error, and so prevented ruthlessly, knowingly and deliberately, by a wrong of the plaintiff-in-error, which at the time was known by the latter to be a deliberate wrong, not fixed by rule or regulation, but in defiance of all rules and regulations the defendant-in-error claims the right to seek redress in any court of justice having jurisdiction of the parties and jurisdiction over wrongs generally. Its remedy was complete and adequate, both at Common Law and under the Statute of Pennsylvania, independently of any Act of Congress, before any Act of Congress was passed on the subject, and not in conflict with any present Act of Congress, by force and virtue of the Constitution and the Laws of the State of Pennsylvania.

FOURTH: There is no pretense that the conduct of the plaintiff-in-error could have been justified, either in the Federal Court or before the Interstate Commerce Commission; no disputed rule is in any way involved, but it is solely a question of the violation of all rules. No question of commerce, state or interstate, is involved.

Defendant-in-error respectfully requests that the judgment be affirmed.

A. L. COLE,
A. M. LIVERIGHT,
For defendant-in-error.

But plaintiff-in-error, at page 35 of its brief, contends that defendant was precluded from bringing the present suit because of its prior election to proceed before the Interstate Commerce Commission. It relies upon the provisions of Section 9 of the Commerce Act. This position is merely to beg the whole question. We have tried to make clear in this and companion cases that the case at bar does not depend upon that Statute, but is actionable at common law as well as under the Act of 1883 of the State of Pennsylvania. Therefore, it does not fall within the prohibition of Section 9 above mentioned which relates solely and exclusively to matters for which the carrier "*may be liable under the provisions of this Act.*" (Interstate Commerce Act of 1887).

The Pennsylvania statute of 1883 involved in this case was passed in aid of and in exercise of the police power of the State. This is very succinctly put by the Supreme Court of Pennsylvania in its opinion in *Puritan Coal Mining Co. vs. Pennsylvania Railroad Co.*, 237 Pa., 453, thus:

"Our own State statute rests for its authority on the police power of the State, and its sole object is to prohibit common carriers which derive all their powers from the State, and have been granted these to the end that they might serve public necessity and convenience, from practicing undue and unreasonable discrimination between shippers in the service they are created to render. The exercise of this power in the way indicated is not interfered with by the Interstate Commerce Act in the absence of action by the Commerce Commission specifically directed against the matter complained of. The thing condemned by our State statute and by the common law was a purely incidental matter, indirectly affecting

interstate commerce, just as was the discrimination in the case of the Missouri Pacific Ry. Co. vs. Larabee Flour Mills, 211 U. S., 612. The two cases on principle cannot be distinguished, and we but follow the plain guidance of that case in holding that the power of the State with respect to the subject matter of the present controversy remains undisturbed. It was not a question in the case whether the cars denied the plaintiff were intended for shipment within the State or beyond. It was sufficient that the offence was committed within the State."

The right to pass such a statute and to enforce it, where thereby interstate commerce is but incidentally affected, is time and again upheld by this Court. We have already at the current term in the case of Pennsylvania Railroad Company vs. Puritan Coal Mining Company, No. 76 October Term, 1914, collated the pertinent authorities and advanced our views in support of this position. That the Court may have the citations within easy reach we here present them:

Wisconsin &c. R. Co. vs. Jacobson, 179 U. S., 287.

Richmond &c. R. Co. vs. Patterson Tobacco Co., 169 U. S., 311.

Western Union Tel. Co. vs. James, 162 U. S., 650.

Atlantic C. L. R. Co. vs. No. Car. Comm'n., 206 U. S., 1.

Louisville & N. R. Co. vs. Kentucky, 161 U. S., 677.

Northern P. R. Co. vs. North Dakota, 216 U. S., 579.

Smith vs. Alabama, 124 U. S., 465.

Hennington vs. Georgia, 163 U. S., 299.

Chicago, M. & St. P. Ry. Co. vs. Iowa, 233 U. S., 334.

Louisville & N. R. Co. vs. Kentucky, 183 U. S., 503, 518.

Western Union Tel. Co. vs. Commercial Mill Co., 218 U. S., 406.

Another authority to the same effect is *Savage vs. Jones*, 225 U. S., 501.

This Court, in upholding the State law, said:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the State, even when it may do so, unless its purpose to effect that result is clearly manifested. This Court has said, and the principle has often been reaffirmed, that in the application of this principle of supremacy of an Act of Congress in a case where the State law is but the exercise of a reserved power, *the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.*"

And as late as January 15, 1915, this Court in

Wadley Southern Railway Co. vs. Georgia,
U. S., Adv. Ops., 1914, page 214, 217

said

" * * * there is, of course, nothing in the provisions of the Federal Constitution which prevents the states from prohibiting and punishing unjust discrimination of its patrons by a public carrier."

No specification of error filed in this case in any way raises the question of the measure of damages, either single or treble damages.

As we understand the record presented here, including plaintiff-in-error's brief, there is but one question raised, and that is the question of jurisdiction. If that is settled adversely to the plaintiff-in-error, there is no other question in this record, requiring or justifying the consideration of this Court.

Of course, if the court below had jurisdiction to enforce the law of the State of Pennsylvania, it could only enforce it according to the tenor of that law; and if the law of Pennsylvania entitled the defendant-in-error to treble damages, the plaintiff-in-error is concluded thereby. In conclusion, we desire to repeat briefly the basis upon which jurisdiction of the State rests in this case.

FIRST: The plaintiff-in-error in the distribution of its cars to the defendant-in-error did not follow or pretend to follow any rule or regulation laid down either by the Federal Courts, the State Courts, the Interstate Commerce Commission, or by Act of Congress. What it did was to ignore all rules promulgated either by the Courts or the Commission.

SECOND: It promulgated a series of rules for distribution of cars, and then in utter defiance of said rules, and in utter defiance of the law of the State of Pennsylvania, it proceeded to refuse cars to the defendant-in-error to its hurt, injury and damage in the amount determined by the trial court; notwithstanding the unfairness of its yard stick, by which it pretended to measure defendant-in-error's rights, it refused to be bound by its own standard.

THIRD: Because the defendant-in-error was substantially prevented from engaging in a lawful busi-

ness by the plaintiff-in-error, and so prevented ruthlessly, knowingly and deliberately, by a wrong of the plaintiff-in-error, which at the time was known by the latter to be a deliberate wrong, not fixed by rule or regulation, but in defiance of all rules and regulations the defendant-in-error claims the right to seek redress in any court of justice having jurisdiction of the parties and jurisdiction over wrongs generally. Its remedy was complete and adequate, both at Common Law and under the Statute of Pennsylvania, independently of any Act of Congress, before any Act of Congress was passed on the subject, and not in conflict with any present Act of Congress, by force and virtue of the Constitution and the Laws of the State of Pennsylvania.

FOURTH: There is no pretense that the conduct of the plaintiff-in-error could have been justified, either in the Federal Court or before the Interstate Commerce Commission; no disputed rule is in any way involved, but it is solely a question of the violation of all rules. No question of commerce, state or interstate, is involved.

Defendant-in-error respectfully requests that the judgment be affirmed.

A. L. COLE,
A. M. LIVERIGHT,
For defendant-in-error.